

No. 92-1639-CFX  
Status: GRANTED

Title: City of Chicago, et al., Petitioners  
v.  
Environmental Defense Fund, et al.

Docketed:  
April 12, 1993

Court: United States Court of Appeals for  
the Seventh Circuit

Counsel for petitioner: Nereim, Mardell

Counsel for respondent: Lazarus, Richard J., Wilhoite Jr., R.  
Edward, Florini, Karen, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 12 1993	G	Petition for writ of certiorari filed.
2	Apr 30 1993		Brief amicus curiae of National League of Cities filed.
4	May 6 1993		Order extending time to file response to petition until June 1, 1993.
5	May 10 1993		Brief amici curiae of Spokane, Washington, et al. filed.
6	May 12 1993		Brief amici curiae of Broward County, Florida, et al. filed.
8	Jun 1 1993	X	Brief of respondents Environmental Defense Fund et al. in opposition filed.
7	Jun 2 1993		DISTRIBUTED. June 18, 1993
9	Jun 21 1993		Petition GRANTED. *****
11	Jun 29 1993		Order extending time to file brief of petitioner on the merits until August 19, 1993.
12	Jul 22 1993	G	Motion of petitioners to dispense with printing the joint appendix filed.
13	Aug 10 1993	*	Record filed. Partial proceedings United States Court of Appeals for the Seventh Circuit.
17	Aug 17 1993		Brief amicus curiae of State of New York filed.
14	Aug 19 1993		Brief amicus curiae of United States filed.
15	Aug 19 1993		Brief amici curiae of Wheelabrator Technologies Inc., et al. filed.
16	Aug 19 1993		Brief amici curiae of Washington Legal Foundation, et al. filed.
18	Aug 19 1993		Brief amici curiae of Barron, County, Wisconsin, et al. filed.
19	Aug 19 1993		Brief amici curiae of National League of Cities, et al. filed.
20	Aug 19 1993		Brief amicus curiae of County of Westchester, New York filed.
21	Aug 19 1993		Brief of petitioners City of Chicago, et al. filed.
22	Aug 19 1993		Brief amici curiae of Spokane, Washington, et al. filed.
24	Aug 30 1993		Order extending time to file brief of respondent on the merits until October 6, 1993.
25	Sep 24 1993		Motion of petitioners to dispense with printing the joint appendix GRANTED.
26	Oct 6 1993		Brief of respondents Environmental Defense Fund Inc., et al. filed.
27	Oct 14 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Entry	Date	Note	Proceedings and Orders
28	Oct 21 1993		Opposition of petitioners City of Chicago, et al. to motion of the Solicitor General for leave to participate in oral filed.
29	Nov 8 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: 25 minutes - petitioners; 25 minutes - respondents; and 10 minutes - Solicitor General. Opinion per curiam.
30	Nov 8 1993		Reply brief of petitioners filed.
31	Nov 16 1993		CIRCULATED.
32	Nov 16 1993	D	Motion of respondents for reconsideration of the Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument filed.
33	Nov 22 1993		SET FOR ARGUMENT WEDNESDAY, JANUARY 19, 1994.(1ST CASE).
34	Dec 6 1993		Motion of respondents for reconsideration of the Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
35	Jan 10 1994		Record filed.
		*	Original proceedings United States District Court for the Northern District of Illinois (Box).
36	Jan 19 1994		ARGUED.



92-1639  
No.

APR 12 1993

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

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THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*  
ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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#### **QUESTION PRESENTED**

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash generated by burning municipal solid waste at such a facility.

### **PARTIES TO THE PROCEEDING**

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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**Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioners, the City of Chicago and Mayor Richard M. Daley, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals on remand from this Court, App., *infra*, 1a-4a, is reported at 985 F.2d 303 (7th Cir. 1993). The original opinion of the court of appeals, App., *infra*, 5a-21a, is reported at 948 F.2d 345 (7th Cir. 1991), vacated and remanded, 113 S. Ct. 486 (1992). The district court's memorandum opinion and order of November 29, 1989, App., *infra*, at 22a-33a, is reported at 727 F. Supp. 419 (N.D. Ill. 1989).



## JURISDICTION

The judgment of the court of appeals upon remand from this Court was originally entered by an unpublished order issued on January 12, 1993. The court of appeals issued a published decision on January 29, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

### 42 U.S.C. § 6921(i)

#### (1) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

##### (1) such facility—

##### (A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

##### (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

## STATEMENT

1. *Background.* As this case comes to the Court for the second time, the country remains in the midst of a waste disposal crisis. We generated approximately 180 million tons of municipal solid waste—the “residential and commercial solid wastes generated within a community” (40 C.F.R. § 241.101(k))—in 1988; that number is projected to grow to 216 million tons by the year 2000. See 56 Fed. Reg. 50978, 50980 (1991) (summarizing the findings of Environmental Protection Agency study). Much of that waste is now deposited in landfills, but we are running out of landfill capacity.

More than fifteen years ago, Congress warned that “alternatives to existing methods of land disposal must be developed since many of the cities of the United States” are running out of waste disposal sites. 42 U.S.C. § 6901(b)(8). More recently, Congress has determined that “the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste.” *Id.* § 6941a(3). See also *id.* § 6941a(2) (“solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials”).

Facilities that extract reusable materials from municipal solid waste or convert solid waste into energy are classified as “resource recovery” facilities under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6903(24). As of November 1991, there were 137 resource recovery facilities in operation in the United States, eleven facilities under construction, and an estimated additional 57 facilities in the planning phase. See Kiser, *Municipal Waste Combustion in the United States:*

*An Overview*, Waste Age (Nov. 1991), at 27, 109.<sup>1</sup> These facilities generate power that is equivalent to the amount of energy needed to supply electricity to 1.2 million homes, or the amount produced by 30 million barrels of oil. *Id.* at 27.

The general federal statutes and regulations governing waste disposal are an important part of the regulatory matrix applicable to the operation of resource recovery facilities. When Congress enacted RCRA, it directed that "hazardous waste" be managed pursuant to a separate regulatory scheme—set forth in Subtitle C of the statute—that establishes standards for the treatment, storage, and disposal of such waste. See 42 U.S.C. §§ 6921-6939.<sup>2</sup> Generators of hazardous waste must obtain an identification number from the United States Environmental Protection Agency (EPA) before engaging in the treatment, storage, transportation, or disposal of hazardous wastes. See 40 C.F.R. § 262.12 (1991). Hazardous waste must be packaged, labelled, and marked according to specific regulations before it may be shipped. See *id.* § 262.30-33. It may be held only in approved containers and only for specified periods of time. See *id.* § 262.34. Facilities that treat, store, or dispose of hazardous waste must obtain permits (see 42 U.S.C. § 6925), and must comply with many regulations setting performance standards for

<sup>1</sup> A more recent survey found that in 1993 there were 128 operating resource recovery facilities, four facilities under construction, and an estimated 42 facilities in planning. Solid Waste & Power, *Energy-from-Waste 1993 Activity Report* i (1993).

<sup>2</sup> The statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or

(B) pose a substantial present or potential hazard to human health when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5).

such facilities. See *id.* § 6924; 40 C.F.R. § 264.1-264.1065.

Disposal of non-hazardous waste is regulated under Subtitle D of RCRA, which provides significantly less stringent regulation than Subtitle C. See 42 U.S.C. §§ 6941-6949. The EPA has promulgated regulations setting minimum national standards for these landfills. See 56 Fed. Reg. 50978 (1991).

Waste from homes and offices frequently contains some components that qualify as hazardous waste under the federal scheme, but Congress made clear in the legislative history of RCRA that it did not intend to regulate such "general municipal wastes" as hazardous waste. S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). The EPA subsequently promulgated a regulation—the "household waste exclusion"—providing that "any material \* \* \* derived from households (including single and multiple residences, hotels and motels \* \* \*) is not a hazardous waste within the meaning of the statute. 40 C.F.R. § 261.4(b)(1). This exclusion permits the disposal of all household waste in a Subtitle D landfill, even if the waste would qualify as hazardous waste under the generally applicable statutory standard. At the time the EPA issued this regulation, it stated that the exclusion extended to ash remaining after household waste was burned in an incinerator. "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33098 (1980).

In 1984, Congress added a new provision to RCRA—Section 3001(i)—entitled "Clarification of household waste exclusion." It states in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purpose of regulation under this



subchapter" if the facility receives and burns only (a) household waste and (b) commercial and industrial solid waste that does not contain hazardous waste. 42 U.S.C. § 6921(i).<sup>3</sup>

The Senate committee report accompanying this provision observed that resource recovery facilities often take in household waste mixed with non-hazardous waste from sources other than households, such as schools, churches, and municipal buildings. The committee stated that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).

The question in this case is whether, pursuant to Section 3001(i), the ash residue remaining after solid waste is burned in a resource recovery facility may be disposed of in a Subtitle D disposal facility, regardless of whether the ash might qualify as a hazardous waste under the generally applicable standard.

2. *The Chicago Resource Recovery Facility.* The City of Chicago owns and operates a resource recovery facility, the Northwest Waste-to-Energy Facility ("Northwest Facility"), where it burns municipal solid waste and generates electricity, thereby reducing the volume of waste disposed of in landfills and helping to reduce dependence on imported oil for the generation of electricity. The facility processes approximately 14% of the muni-

<sup>3</sup> In addition, the facility may not accept hazardous waste, and the owner or operator of the facility must "establish[] contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. § 6921(i)(2).

cipal solid waste produced in Chicago. R. 18. It also produces steam by recovering the energy generated from the combustion of the waste. The facility not only uses the steam for its own operations, but also sells it for \$1 million to nearby industry and for another \$500,000 to the local utility. *Ibid.* Finally, the facility recovers approximately 55 tons of tin cans and other ferrous metals each day, which are sold to scrap metal dealers. *Ibid.*

At the time that this case was before the district court, the City disposed of the ash remaining at a sanitary landfill located in Three Oaks, Michigan, that received only municipal incinerator ash. R. 18. This is a lined landfill with a leachate collection system and groundwater monitoring systems to monitor its performance. *Ibid.* The City does not test the ash produced at the Northwest Facility to determine whether it would be classified as hazardous under EPA regulations, and has not managed the ash as a hazardous waste.

3. *The Proceedings Below.* The Environmental Defense Fund and Citizens for a Better Environment (hereinafter collectively referred to as EDF) filed the complaint in this case, alleging that the City violated several provisions of RCRA, 42 U.S.C. §§ 6901-6992(k), by not handling the ash produced at the Northwest Facility as a hazardous waste pursuant to Subtitle C of RCRA. R. 1. The district court had jurisdiction over this federal question pursuant to 28 U.S.C. § 1331. EDF simultaneously filed a similar action in the Southern District of New York against Wheelabrator Technologies, Inc. and Westchester Resco Co., which own and operate a resource recovery facility in Peekskill, New York. See *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991).

In this case, the parties filed cross motions for summary judgment. R. 18, 30. The City's position was that Section 3001(i) exempted the process of incinerating

waste and producing ash at a resource recovery facility from regulation as hazardous waste. In addition to filing its own motion for summary judgment, EDF opposed the City's motion on the ground that the City had not yet demonstrated that the City's facility met the requirements of Section 3001(i).

The district court issued a memorandum opinion and order holding that Section 3001(i) of RCRA exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. App., *infra*, at 22a. The court held that when Congress amended RCRA to exempt resource recovery facilities from hazardous waste regulations, it intended to exclude all waste management activities at these facilities from regulation. *Id.* at 28a. The district court found that this conclusion was consistent with RCRA's policy goal of encouraging resource recovery facilities and removing impediments that may hinder their development and operation. *Ibid.* The district court, however, denied both motions for summary judgment, and allowed EDF additional discovery to determine whether the Chicago facility followed the procedures required under Section 3001(i) for excluding the intake of hazardous wastes. *Id.* at 33a. EDF later stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and would not oppose a renewed motion for summary judgment by the City. R. 91. The district court subsequently granted the City's renewed motion for summary judgment. App., *infra*, at 34a.

A divided court of appeals reversed in an opinion issued on November 19, 1991. The majority held that the ash generated by a municipal solid waste incinerator must be disposed of in accordance with the provisions of Subtitle C of RCRA. App., *infra*, at 18a, 20a. The majority focused on the Section 3001(i) exception from hazardous waste regulations when a resource recovery facility is "treating, storing, disposing of, or otherwise managing" waste, noting that that section does not ex-

plicitly exempt the ash "generated" by such facilities. App., *infra*, at 18a-19a. The majority acknowledged that the only other appellate court to address this issue, the Second Circuit in the *Wheelabrator* case, had reached the opposite conclusion. *Id.* at 8a. In that case, the Second Circuit concluded that Section 3001(i) of RCRA exempted the ash remaining after incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. See *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d at 213.

Judge Ripple dissented, stating that he would affirm for the reasons stated in the Second Circuit and Southern District of New York opinions. App., *infra*, at 21a.

The City filed a petition for a writ of certiorari on February 18, 1992. EDF acknowledged the square conflict with the decision in *Wheelabrator* and agreed that the case presented an important question of federal law. Brief for Respondent, No. 91-1328, at 8 (on petition). EDF urged the court to grant certiorari. *Id.* at 8, 12, 17. By order of May 18, 1992, the Court invited the views of the Solicitor General.

On September 18, 1992, the Administrator of the EPA issued a memorandum setting forth EPA's decision that under Section 3001(i) of RCRA, the ash generated from the combustion of municipal solid waste at resource recovery facilities should be treated as exempt from hazardous waste regulation under Subtitle C of RCRA. App., *infra*, at 41a. Shortly thereafter, the Solicitor General responded to the court's invitation by suggesting that the petition be granted, the decision vacated, and the case remanded to the Seventh Circuit for further consideration in light of the EPA memorandum. Brief for the United States as Amicus Curiae, No. 91-1328, at 7, 13, 18 (on petition). On November 16, 1992, this Court entered the suggested order. *City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (granting, vacating, and remanding).



On remand, the same divided court of appeals panel reaffirmed its previous decision. The majority held that the EPA memorandum did not affect its opinion or judgment in this case. App., *infra*, at 2a. Judge Ripple again dissented, stating that the EPA's action deserved deferential review and that, accordingly, he would affirm the judgment of the district court. App., *infra*, at 3a-4a.

### REASONS FOR GRANTING THE PETITION

The Seventh Circuit's second decision in this case still squarely conflicts with the decision of the Second Circuit on an important issue of federal environmental law affecting resource recovery facilities throughout the country that burn municipal solid waste to produce energy. Although this Court afforded the Seventh Circuit the opportunity itself to resolve the conflict, that court has declined the invitation to do so. As a result, the conflict that we noted in our prior petition—and that the court below, EDF, and the Solicitor General acknowledged—remains. Resource recovery facilities located in the Second Circuit may manage the ash left after they burn municipal solid waste as a non-hazardous waste pursuant to Subtitle D of RCRA, but, as a result of the decision below, all resource recovery facilities in the Seventh Circuit must manage the ash as a hazardous waste pursuant to Subtitle C. These conflicting decisions destroy the uniformity necessary to the effectiveness of environmental policy.

The conflict between the circuits also produces substantial hardship and unfairness. Subtitle C disposal is considerably more onerous, and therefore, much more expensive, than disposal under Subtitle D.<sup>4</sup> That addi-

<sup>4</sup> In the September 1992 memorandum, EPA noted that the cost of Subtitle C disposal is ten times the cost of Subtitle D disposal. The memorandum states that "[a]lthough costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC [municipal waste combustion] ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and dis-

tional cost has been imposed on resource recovery facilities within the Seventh Circuit, but not on facilities in the Second Circuit.

Moreover, resource recovery facilities in other circuits continue to face great uncertainty in determining how to manage their ash. Their choice is to treat the ash as a hazardous waste or ship it to a circuit where it has not been held to be a hazardous waste, either way incurring large and perhaps wholly unnecessary expenses that would substantially alter the economics of running such a facility. Or they may treat the ash as a non-hazardous waste and risk the heavy penalties that may be imposed in the event that other courts subsequently hold that the ash is a hazardous waste that should have been managed in accordance with Subtitle C. Transporters of ash and operators of waste disposal facilities that receive ash face similar uncertainty: they are all subject to huge monetary penalties if they fail to comply with Subtitle C requirements and those provisions are later held applicable to ash. Indeed, this state of affairs creates the anomalous possibility that municipal waste in one circuit might now be transported to another circuit for incineration. The petition for a writ of certiorari should be granted to resolve this conflict, eliminate the by now long-standing uncertainty, and alleviate the unwarranted burden on resource recovery facilities in the Seventh Circuit.

1. The Second and Seventh Circuits' interpretations of Section 3001(i) of RCRA remain diametrically opposed. Section 3001(i) provides, in pertinent part, that:

posing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous." App., *infra*, at 48a-49a. Based on these average figures, the increased costs for the City's Northwest Facility, which must dispose of between 110,000 and 140,000 tons of ash annually (App., *infra*, at 6a), could amount to more than \$57 million each year.



A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] \* \* \*.

42 U.S.C. § 6921(i). The Seventh Circuit's majority held that because this section did not specifically provide an exemption for generating hazardous waste, the ash produced by resource recovery facilities burning municipal solid waste must be managed as hazardous waste, notwithstanding the specific exemptions for "treating, storing, disposing of, or otherwise managing hazardous wastes." The Second Circuit, by contrast, interpreting Section 3001(i) in the *Wheelabrator* case, held that this section did exempt from hazardous waste regulation the ash generated by the burning of municipal solid waste, notwithstanding the absence of a specific exemption in the statute for generating hazardous waste. *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 765, 770 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991).<sup>5</sup>

As a result of the conflict in the circuits, resource recovery facilities are uncertain how to plan and carry out their operations. Local governments that operate or contract with resource recovery facilities as well as disposal site operators, are subject to substantial penalties under RCRA—up to \$25,000 per day—for mishandling hazardous waste. See 42 U.S.C. § 6928(g). And, as this case demonstrates, actions seeking penalties may be brought by private parties (42 U.S.C. § 6972(a)), not just by the EPA. Accordingly, all resource recovery facilities outside of the Second and Seventh Circuits and the numerous waste disposal facilities in those 44 states must now choose among incurring the very significant costs of treating the ash as a hazardous waste (see note 4, *supra*).

<sup>5</sup> When this Court denied the petition in the *Wheelabrator* case, there was no conflict between the circuits because the Seventh Circuit had not yet issued its opinion in the present case.

facing harsh RCRA penalties if they guess wrongly about how the ash should be treated in their circuit, or shipping waste to the Second Circuit for incineration. Such a situation is intolerable. Efficient operations under a statute as complex and specific as RCRA are severely compromised by this uncertainty.

The practical problems this lack of uniformity can cause are well illustrated in this case. The City's Northwest Facility is located in the City of Chicago, in the Seventh Circuit. The ash produced at that facility was disposed of at a landfill located in Michigan, in the Sixth Circuit. Although the ash is regulated as a hazardous waste within the Seventh Circuit, the Sixth Circuit Court of Appeals has not addressed the issue. But the landfill that used to accept the ash from the Northwest Facility is as effectively regulated as if there were law in that circuit. The City of Chicago cannot, under the Seventh Circuit's ruling, do business with the landfill in Michigan, unless it moves its incinerator to the Sixth Circuit, or contracts with an incinerator operator there. The situation facing local governments in the First and Third Circuits is even more precarious. Under the *Wheelabrator* case, a resource recovery facility in the Second Circuit can continue to dispose of ash under Subtitle D of RCRA. But a disposal site in an adjacent circuit, where the court of appeals has not spoken, might well refuse to accept municipal ash because of the fear of RCRA penalties, should the First and Third Circuits ultimately side with the Seventh in requiring such ash to be managed as hazardous waste under Subtitle C. Yet, waste from the First and Third Circuits could still be shipped to the Second for incineration, although it is far from clear which circuit's law would apply in an action seeking to impose fines on a local government sending its waste to another circuit.

Federal regulation of the ash, whether under Subtitle D or Subtitle C of RCRA, should be uniform throughout the country. This Court should resolve this conflict so that

federal regulation of the ash does not depend upon the location of the resource recovery facility and so that resource recovery facilities and disposal sites can plan and carry out their operations with certainty.

2. The decision of the Seventh Circuit majority is also wrong. It is at odds with the plain language of the statute, its purpose, and intent. The language of Section 3001(i) is broad. It exempts the activities of a resource recovery facility from all hazardous waste regulation—those governing “treating, storing, disposing of or otherwise managing” waste. The statutory definition of hazardous waste “management” includes all “storage, transportation, processing, treatment, recovery and disposal of hazardous wastes.” 42 U.S.C. § 6903(7). “Treatment” is defined, in part, as “any method, technique, or process \* \* \* designed \* \* \* so as to render such waste \* \* \* reduced in volume.” 42 U.S.C. § 6903(34). These terms plainly encompass producing and then handling and disposing of ash. Thus, by holding that Subtitle C regulations apply to the production and handling of ash, the Seventh Circuit has violated the plain terms of Section 3001(i), which indicates that facilities like the Northwest Facility need not comply with the requirements of Subtitle C because they do not treat or “manag[e] hazardous wastes.”

The legislative history of Section 3001(i) also indicates its broad scope. It clarifies that the ash produced at a resource recovery facility is exempt from regulation. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation and commented on Section 3001(i), clearly stated that “[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion \* \* \*.” S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). In addition, Section 3001(i) is a clarification of the EPA’s Household Waste Exclusion, “a previously existing regulatory exclusion which clearly extended to ash.” *Wheelabrator*, 725 F. Supp. at 765.

Because the EPA’s Household Waste Exclusion extends to the ash produced when household waste is burned, the result of the Seventh Circuit’s construction of the statute is that ash produced by incinerators burning only household waste is exempt from Subtitle C regulation, but ash produced by resource recovery facilities is not. See *Wheelabrator*, 725 F. Supp. at 765. Thus, the court below has transformed a statute designed to provide an incentive for resource recovery by relieving regulatory burdens on resource recovery facilities into one that subjects those facilities to greater regulation and increased costs. That is precisely the opposite of what Congress sought to achieve.

Indeed, if Section 3001(i) subjects the ash remaining from the burning of municipal waste to Subtitle C regulation, Section 3001(i) provides little if any regulatory relief for resource recovery facilities because it fails to exempt these facilities from one of the most onerous regulatory burdens. See *Wheelabrator*, 725 F. Supp. at 763 n.12 (if ash is not exempt from regulation as a hazardous waste “it is difficult to understand what, if any, benefit [resource recovery facilities] deriv[e] from the exemption”). This misinterpretation of Section 3001(i) should be corrected by this Court.

Even if Section 3001(i) were ambiguous, the Seventh Circuit erred. On remand from this Court, the Seventh Circuit should have deferred to the reasonable interpretation of Section 3001(i) reached by the EPA, the agency charged with the administration of RCRA. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

3. Important policy considerations favor the resolution of the question presented in this case. Disposal of garbage is one of the major problems local governments are facing today. Congress has recognized that the United States is confronted with a solid waste disposal crisis, due to an ever increasing volume of solid waste and a rapidly diminishing amount of landfill space (see 42 U.S.C.



§ 6901(a) and (b)), and that reliance on landfills as the primary method for solid waste disposal needlessly pollutes valuable land and results in the burial of millions of tons of recoverable materials and energy sources (see *id.* § 6901(b)(1), (c) and (d)). Congress has found that the recovery of solid waste materials "can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments" (*id.* § 6901(c)(3)), and that solid wastes represent a potential source of energy that can reduce the nation's dependence upon sources of energy such as petroleum products, natural gas, and nuclear or hydroelectric generation of energy (*id.* § 6901(d)). When Congress amended Subtitle D of RCRA in 1980, it found that:

(2) solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;

(3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste.

*Id.* § 6941(a)(2) and (3). Resource recovery facilities further these congressional goals.

The conclusion of the majority below that Congress would not have approved the disposal of hazardous ash in ordinary landfills, App., *infra*, at 20a, ignored these important reasons Congress had for encouraging the development and use of resource recovery facilities. Congress has made it clear that it intends to encourage resource recovery facilities. See 42 U.S.C. §§ 6902(1), (10) and (11), 6948(d)(3). Indeed, the Senate Report accompanying Section 3001(i) states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No.

284 at 61. The congressional choice reflected in Section 3001(i) to exclude the waste management activities of resource recovery facilities from hazardous waste management regulations was intended to encourage resource recovery as one of the solutions to this country's mounting solid waste disposal crisis.

The present confusion regarding the scope of the Section 3001(i) exemption will have a significant deterrent effect on development of additional resource recovery facilities. The cost of disposing of ash is an important element of the economics of operating these facilities. See note 4, *supra*. Municipalities considering such a project cannot now determine whether resource recovery will be justified economically because they cannot make any reliable projection of disposal costs. A municipality would be unlikely to embark on such an expensive undertaking when it has no way to predict the eventual costs and, therefore, whether the anticipated revenues would cover those costs. Thus, the uncertainty spawned by the conflicting appellate decisions is at the present time thwarting Congress's clear purpose of encouraging use of this technology.

4. Finally, both the Second Circuit and the Seventh Circuit concluded that Congress has left the question of the meaning of Section 3001(i) for judicial resolution. See *Wheelabrator*, 931 F.2d at 213; App., *infra*, at 9a. This conclusion was based upon Section 306 of the Clean Air Act Amendments of 1990, which provides that:

For a period of 2 years after the date of the enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act. Such reference and limitation shall not be construed to affect any activity by the administrator following the 2-year period from the date of enactment of the Clean Air Act Amendments of 1990.

Clean Air Amendments, Pub. L. No. 101-549, § 306, 104 Stat. 2399, 2584 (1990). The Conference Report accompanying this section specifically stated that "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.*, 725 F. Supp. 758 (2d Cir. [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.), or any state activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 3867, 3874. Both courts of appeals interpreted this section of the Clean Air Act Amendments to mean that Congress intended to preclude the EPA from promulgating any new regulations, but to allow the EPA to enforce the regulatory scheme already in place. See *Wheelabrator*, 931 F.2d at 213; App., *infra*, at 9a. Both courts concluded that Congress was waiting for the courts to resolve the issue raised in these cases.<sup>6</sup> The two courts, however, reached opposite conclusions about the meaning of Section 3001(i), and despite this Court's remand of this case to the Seventh Circuit for further consideration in light of the EPA memorandum of September 1992, the courts remain in conflict. Because the courts of appeals are in disagreement, it is up to this Court to provide Congress with a judicial resolution of that question.<sup>7</sup>

<sup>6</sup> The Seventh Circuit stated that "it may well have been that Congress wanted to see what the courts had to say before undertaking any retooling of the current regulatory scheme." App., *infra*, at 9a. Similarly, the Second Circuit stated that "Congress simply may have desired to maintain the status quo pending judicial resolution of the issues presented here and in *City of Chicago*. Once the courts have spoken, Congress will be in a better position to evaluate its options regarding the treatment of incinerator ash and to direct its future legislative efforts accordingly." *Wheelabrator*, 931 F.2d at 213.

<sup>7</sup> There is no indication that Congress is likely to resolve the issue raised in this case at any time in the near future. No bill has yet been introduced in this Congress. Even if RCRA were

Moreover, although that EPA memorandum represents EPA's definitive position on this issue, it failed to resolve the conflict in the interpretation of Section 3001(i) because the Seventh Circuit has rejected the EPA's interpretation. In its opinion on remand, the majority concluded that "[t]he agency's change of position and Administrator Reilly's memorandum explaining it do not persuade us that our analysis of RCRA was in error." App., *infra*, at 2a.

In sum, there is a conflict between the circuits on an important issue of environmental law: the management of ash produced at resource recovery facilities. A federal statute that depends for its effectiveness on uniform application throughout the country has been interpreted to exempt the ash from hazardous waste regulation in the Second Circuit, but to require the management of the ash as a hazardous waste in the Seventh Circuit, with the result that resource recovery facilities in all other circuits are uncertain how to manage their ash. Moreover, Congress has indicated that it is waiting for judicial resolution of this issue, and indeed there is no resolution likely from any other quarter. The courts of appeals and the EPA have been unable to resolve this issue. This Court should, therefore, resolve the question whether Section 3001(i) of RCRA exempts the ash produced at resource recovery facilities from hazardous waste regulation.

reauthorized, the new statute may not deal with this issue. Moreover, a new statute might be prospective only, leaving all municipalities with resource recovery facilities outside of the Second Circuit with potential liability for substantial penalties in civil penalty actions, like this one, that can be commenced by private parties (see 42 U.S.C. § 6972(a)), if the issue how the ash is to be regulated is not resolved by this Court. Resource recovery facilities should not be left in a state of uncertainty based on speculation that Congress might act to address this issue some time in the future.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 12, 1993

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# **APPENDIX**

1a

APPENDIX

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 90-3060

ENVIRONMENTAL DEFENSE FUND, INC.  
and CITIZENS FOR A BETTER ENVIRONMENT,  
*Plaintiffs-Appellants,*

v.

CITY OF CHICAGO and MAYOR RICHARD M. DALEY,  
*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division  
No. 88 C 769—James B. Moran, *Chief Judge*

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DECIDED JANUARY 29, 1993 <sup>1</sup>  
ON REMAND FROM THE SUPREME COURT  
OF THE UNITED STATES  
No. 91-1328

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Before BAUER, *Chief Judge*, POSNER and RIPPLE,  
*Circuit Judges.*

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<sup>1</sup> This decision was originally rendered by unpublished order on January 12, 1993. See Circuit Rule 53. The Court has subsequently decided to issue the decision as an opinion.

BAUER, *Chief Judge*. The Supreme Court granted certiorari in this case and vacated our judgment. *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991), *vacated*, No. 91-1328, 61 U.S.L.W. 3369 (Nov. 17, 1992). The Court has remanded the case for reconsideration in light of a memorandum issued by the Administrator of the Environmental Protection Agency ("EPA") to regional administrators about the "Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)." Memorandum of William K. Reilly, Administrator, Environmental Protection Agency, dated September 18, 1992. We have requested and received Circuit Rule 54 Statements of Position from both parties. In our earlier opinion, we ruled that ash generated in the combustion of municipal waste is subject to the regulatory scheme governing hazardous waste set forth in Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6992k ("RCRA"). This order assumes familiarity with our earlier opinion in this case, which appears at 948 F.2d 354 (7th Cir. 1991).

The EPA memorandum explains the agency's new interpretation of Section 3001(i) of RCRA, 42 U.S.C. § 6921(i). The agency's new interpretation represents a change in the agency's prior official position that ash generated by the combustion of municipal waste is not included in the Section 3001(i) exemption. *See* 50 Fed. Reg. 28,725-26 (July 15, 1985). Hence, the EPA's interpretation now conflicts with ours.

The agency's change of position and Administrator Reilly's memorandum explaining it do not persuade us that our analysis of the RCRA was in error. As we explained in the original opinion, the EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers. 948 F.2d at 350. This additional change of position does not alter that conclusion.

Administrator Reilly explained the change of position is justified because the language of Section 3001(i) is ambiguous and its legislative history supports the agency's conclusion that the ash should be exempted under Section 3001(i). These arguments were presented to this court by the City and we considered and rejected them, finding that the plain language of the statute is dispositive. The EPA offers no new support for these arguments in its memorandum, and we continue to find them unpersuasive. Further, because we believe the language of Section 3001(i) is clear, the public policy arguments Reilly discusses in the memorandum cannot override the mandate of the statute. Only Congress may change the law in response to policy arguments, courts may not do so.

Accordingly, upon reconsideration of the parties' statements of position and the memorandum, we hold that the EPA memorandum does not affect our opinion or judgment in this case.

RIPPLE, *Circuit Judge*, dissenting. This case is before us on remand from the Supreme Court of the United States. We have been directed to reconsider our earlier decision in light of the memorandum of the Administrator of the Environmental Protection Agency of September 18, 1992. In my view, despite the varying interpretations given the statute by the agency in the past, we are not, under the circumstances here, entirely relieved of our obligation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the reasonable interpretation of the agency charged with the administration of the statute. It is true that the Supreme Court has said that "[a]s a general matter . . . the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991). The Court has also stressed, however, that "[a]n initial agency interpretation



is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Indeed, the agency has the continuing obligation to ensure that its interpretation is reasonable by considering "varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

The reasonableness of the Administrator's interpretation must be assessed "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Id.* at 863. As the Solicitor General graphically set out in his brief before the Supreme Court, the basic problem is that Congress has simply failed to address a major environmental policy question. See Br. of the United States as Amicus Curiae at 11 n.6, *City of Chicago v. Environmental Defense Fund* (No. 91-1328). Consequently, the Administrator has attempted to resolve the matter on the basis of the available evidence. Here, confronted with the split of authority between two courts of appeals, the Administrator took another look at an admittedly ambiguous issue and reassessed his earlier pronouncements. In my view, this was responsible agency action and is deserving of our deferential review.

While the Administrator's approach differs somewhat from the analysis of my colleagues in the Second Circuit (and while I find Judge Haight's presentation somewhat more convincing than the Administrator's), I do not perceive that tension to be a fundamental one. Accordingly, I would affirm the judgment of the district court. Hopefully, Congress will make the policy decision that needs to be made and the highest court in the land will be spared the necessity of having to deal with what is, at bottom, a problem for the legislative branch.

A true Copy:

Teste:

Clerk of the United States Court of  
Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 90-3060

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Plaintiffs-Appellants*,

v.

THE CITY OF CHICAGO, *et al.*,  
*Defendants-Appellees*.

Appeal from the United States District Court  
for the Northern District of Illinois  
No. 88 C 769—James B. Moran, *Chief Judge*

ARGUED MAY 10, 1991—DECIDED NOVEMBER 19, 1991

Before BAUER, *Chief Judge*, POSNER, and RIPPLE,  
*Circuit Judges*.\*

BAUER, *Chief Judge*. In this case, we are asked to determine whether the ash generated by a municipal solid waste incinerator is "hazardous waste" that must be disposed of in accordance with the provisions of Subtitle C

\* This opinion was circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(f) because of an apparent conflict with *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F.Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991). No judge favored rehearing *en banc*; Judge Richard D. Cudahy did not participate.

of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6992k ("RCRA"). The incinerator in question—the Northwest Waste-to-Energy Facility—has been owned and operated by the City of Chicago ("the City") since 1971. Faced with rapidly diminishing space for landfill, the City has turned to innovative methods to dispose of the approximately 2.5 million tons of solid waste generated each year. The Northwest Facility was one of the first modern waste-to-energy resource recovery facilities in the United States and the only one in the State of Illinois. Each day, it receives for processing 200 to 250 truckloads of refuse, the bulk coming from residential units. The plant incinerates 350,000 tons of waste annually. The steam generated from the combustion of waste is used to run the facility.

The plaintiffs, the Environmental Defense Fund, Inc., and Citizens for a Better Environment (collectively, "EDF"), filed a complaint against the City and its mayor alleging that the City violated provisions of RCRA and its regulations governing the handling of hazardous waste. EDF maintains that the City is violating RCRA by unlawfully storing, transporting, disposing of, and otherwise handling the by-product of the incineration at the Northwest Facility, the 110,000 to 140,000 tons of ash produced every year. According to the EDF, the toxicity level of the ash is high enough to qualify it as a hazardous waste subject to special treatment under Subtitle C of RCRA. Between 1981 and 1987, thirty-five samples of ash from the Northwest Facility were tested. Out of these, thirty-two exhibited enough lead, cadmium, or both, to meet the standard for Extraction Procedure toxicity, which forms a part of Subtitle C.

Subtitle C establishes a regulatory scheme governing the treatment, storage, and disposal of hazardous wastes. (Non-hazardous waste is governed by Subtitle D of RCRA.) Generators of hazardous waste must apply for and receive a United States EPA identification number

before engaging in the treatment, storage, disposal, transportation, or offering for transportation of hazardous waste. See 40 C.F.R. § 262.12. Before shipping, hazardous waste must be packaged, labelled, and marked according to specific regulations. See 40 C.F.R. § 262.30-33. Hazardous waste must be accumulated in approved containers and only for specified periods of time. 40 C.F.R. § 262.34. Generators of hazardous waste also must maintain certain records, and file biennial reports with the EPA Regional Administrator. See 40 C.F.R. § 262.40-43. The ash produced by the Northwest Facility is not dealt with pursuant to this "cradle to grave" regulatory scheme. Instead, it is shipped off to Michigan for burial in a landfill site that is not licensed to accept hazardous wastes.

In the district court the parties filed cross motions for summary judgment. The City argued that the ash produced at the Northwest Facility is exempt from regulation under section 3001(i) of RCRA, 42 U.S.C. § 6921 (i), which provides that a resource recovery facility will not be deemed to be "treating, storing, disposing of, or otherwise managing" hazardous wastes for the purposes of regulation if the facility meets certain requirements. In addition to filing its own motion for summary judgment, EDF also opposed the City's motion on the ground that the City had not demonstrated that the Northwest Facility met the requirements of section 3001(i).

On November 29, 1989, the district court issued a memorandum and order, holding that section 3001(i) exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. See *Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419, 424 (N.D. Ill. 1989). The district court, however, denied both motions for summary judgment, allowing EDF additional discovery to determine whether the Chicago facility met the requirements of section 3001(i). In July 1990, EDF stipulated that it would not contest the ade-



quacy of the Northwest Facility's procedures for excluding hazardous wastes and that it would not oppose a renewed motion for summary judgment by the City. On August 20, 1990, the district court granted the City's renewed motion for summary judgment. This appeal followed.

This case turns on the construction of section 3001(i). To make sense of this statute, we must sort through conflicting, often confusing, pronouncements from Congress and the EPA. Indeed, the EPA's various interpretations of the statute have muddied the waters to such an extent that courts have failed to give it the deference normally accorded to an agency's construction of a statute it administers. See, e.g., *Environmental Defense Fund v. City of Chicago*, 727 F. Supp. at 424; *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 766 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991). The Second Circuit, the only appeals court to interpret section 3001(i) thus far, concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. *Wheelabrator*, 931 F.2d at 213.

As a threshold issue, we must consider whether, as the City suggests, this case has been rendered moot by passage of the 1990 amendments to the Clean Air Act. Section 306 of the amendments provides in part that "[f]or a period of 2 years after the date of enactment . . . ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to Section 3001 of the Solid Waste Disposal Act." Pub. L. No. 101-549, 104 Stat. 2399 (1990). When Congress enacted this provision, it was well aware that this matter was pending on appeal. The accompanying committee report explains, "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *En-*

*vironmental Defense Fund v. Wheelabrator, Inc.*, 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.) [sic], or any State activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342, *reprinted in* 1990 U.S.C.C.A.N. 3867, 3874.

What all this means is that the amendments to the Clean Air Act do not render this matter moot, but rather maintain the status quo until the time Congress reauthorizes RCRA. After that period expires, Congress may determine whether it wishes to revise the statute with regard to the ash question. Although we cannot say for certain, it well may have been that Congress wanted to see what the courts had to say on the issue before undertaking any retooling of the current regulatory scheme. Until then, the EPA is precluded from promulgating regulations on ash pursuant to section 3001(i). Nothing in the amendments, however, suggests that the EPA may not enforce the scheme now in place. What that covers, exactly, is for us to determine.

Having concluded that the matter properly is before us, we turn our attention to the district court's decision. As with all summary judgment determinations, we review the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law. See, e.g., *Santella v. City of Chicago*, 936 F.2d 328, 331 (7th Cir. 1991); *Dieckhoff v. Severson*, 915 F.2d 1145, 1148 (7th Cir. 1990). Before we can proceed, we must trace our way through a somewhat complicated statutory and regulatory scheme.

In 1980, EPA issued the "household waste exclusion," a regulation that explicitly exempted household waste from the statutory definition of "hazardous waste." See 45 Fed. Reg. 33,120 (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)). The exclusion had the effect of releasing households and municipalities from the burden of complying with the cumbersome requirements of Sub-

title C. In the preamble to the regulation, the EPA stated that, "[s]ince household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.*

Congress never ratified this statement in the form of legislation. Instead, it enacted section 3001(i) in 1984 as part of the Hazardous and Solid Waste Amendments to RCRA to "clarify" the EPA's household waste exclusion. (Actually, Congress was interested in excluding from the extremely complex regulations that apply to facilities that specifically target hazardous waste municipal incinerators that inadvertently process hazardous materials that slip in with all the other junk.) Section 3001(i) provided the following:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subsection if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section. . . .

42 U.S.C. § 6921(i).

Unlike the EPA preamble, section 3001(i) does not explicitly exempt the ash generated from resource recovery facilities from regulation as a hazardous waste. Nonetheless, each party to this litigation argues that the plain words of section 3001(i) support its position. The EDF

contends that the section 3001(i) exemption covers only very specific activities of municipal incinerators that handle household and commercial waste, including "treating, storing, disposing of, or otherwise managing hazardous wastes," but not the generating of hazardous wastes. In contrast, the City maintains that "managing" hazardous wastes covers everything that a resource recovery facility does, including the disposal of the ash residue resulting from incineration of municipal solid wastes.

The EPA's interpretation and the legislative history of the statute do little to resolve this stand-off. Following adoption of section 3001(i), the EPA incorporated its provisions into EPA regulations. *See* 40 C.F.R. § 261.4 (b)(1). In a preamble to the new regulations, the EPA explained:

The statute [section 3001(i)] is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith effort to avoid such a result, from becoming subject to the Subtitle C regulations.

50 Fed. Reg. 28,725-26 (July 15, 1985).



Although not an all-out endorsement, this statement certainly runs in favor of subjecting the ash by-product of incineration to Subtitle C regulation. But was, as the EPA suggests, the legislative history silent on the ash question? Both the *Wheelabrator* district court, as affirmed by the Second Circuit, and the district court here held that the legislative history of RCRA demonstrates that Congress intended to exempt resource recovery facilities—and the ash they produce—from hazardous waste statutes and regulations. See *Environmental Defense Fund v. City of Chicago*, 727 F. Supp. at 424; *Wheelabrator*, 725 F. Supp. at 770. For support, both courts heavily rely on a statement in the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation. The Report stated that all waste management activities of such facilities are included within the household waste exclusion, including “the generation, transportation, treatment, storage and disposal of waste. . . .” S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis supplied). The *Wheelabrator* district court indicated that the Report “could not be more explicit”:

It includes the term “generation,” that term upon which EDF places so much emphasis. While it is true that the legislation itself does not include the term generation and that it is the legislation with which we are concerned, the legislative history is probative on the issue of Congress’ intent, given that the scope of the statute is unclear on its face.

725 F. Supp. at 765.

But was congressional intent, as suggested by the *Wheelabrator* district court, that “explicit?” On October 2, 1987, six senators and a member of the House (Representative Florio) sent two letters to Lee Thomas of the EPA. Both letters struck the same notes. Only the first letter, signed by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell, is reproduced here:

We are writing to urge that the Agency [EPA] refrain from issuing any policy statements or legal interpretations of the Resource Conservation and Recovery Act as it relates to the management of ash generated by municipal solid waste incinerators pending further consultation and coordination with Congress. We are concerned that the Agency may be on the verge of interpreting these requirements, possibly in a manner inconsistent with the law, at a time our Committee is considering legislation specifically resolving this issue.

In our view, section 3001(i) of the Solid Waste Disposal Act, often known as RCRA, as amended in 1984 does not exempt owners or operators of municipal solid waste incinerators from the obligations: 1) to determine whether the ash residues generated by the incineration process are hazardous wastes, and 2) to handle ash exhibiting hazardous waste characteristics as hazardous wastes in accordance with the requirements of Subtitle C of RCRA. Thus, we concur in the Agency’s statement in the preamble to the July 15, 1985 codification rule that in the 1984 amendments Congress did *not* “exempt the regulation [sic] of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.”

*Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 1-2 (May 11, 1989) (“Hearings on H.R. 2162”).*

In another development, on May 11, 1989, Congressman Thomas A. Luken, Chairman of the House Subcommittee on Transportation and Hazardous Materials, called a hearing on a proposed bill to regulate municipal solid waste incinerator ash under Subtitle D of RCRA. The



Congressman made the following comments in his opening statement:

A statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. The very basic question of whether or not ash should be regulated under subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute. . . . This uncertainty has been exacerbated by conflicting signals sent by the EPA. That is not a criticism of EPA. Originally the EPA stated that incinerator ash must be tested for toxicity, and managed accordingly, but more recently the EPA has made various pronouncements which conflict with that original policy. It has become clear that legislative action is needed.

With regard to the EPA's lack of clarity on the subject, the "conflicting signals" to which Congressman Luken was referring begin with the preamble to the household waste exclusion. It most definitely exempted ash from regulation as a hazardous waste. The preamble to the regulation that mirrored section 3001(i), however, did not regard the statute as exempting from regulation ash exhibiting characteristics of hazardous waste. This difference is not explained away by later statements from EPA officials. In December 1987, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. Porter responded to a question regarding incinerator ash:

Currently, EPA's regulations merely restate the statutory language. In the preamble codifying this statutory language, however, EPA advanced an interpretation of the statute that would subject ash residue's [sic] from energy-recovering MWC's [Municipal Waste Combustors] to Subtitle C regulation if the ash exhibited a characteristic of hazardous waste. The Agency has reexamined that interpreta-

tion and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.

It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion."

Hearings on H.R. 2162, 16-17 (testimony of J. Winston Porter).

Just a few months later, in May 1988, Sylvia Lowrance, who was at that time the Director of the EPA's Office of Solid Waste, offered the following testimony to the same congressional hearing:

In our codification of [section 3001(i)] we stated that, in our view, the provision excludes energy recovery facilities burning household waste along with nonhazardous waste from commercial and industrial sources from regulation under subtitle C.

With regard to the ash, however, produced from such facilities, we said in a 1985 notice that the ash generated by these facilities which exhibits a characteristic of the hazardous waste must be managed as a hazardous waste.

We continue to follow that 1985 policy, and that is our current interpretation. However, there is substantial controversy surrounding that interpretation. We are in litigation challenging the EPA's interpretation of section 3001(i). We believe the law is ambiguous given it is silent with regard to treatment of ash under that section.

We do believe it needs to be clarified. What we believe is of paramount importance is that ash be safely managed in a technically sound matter [sic].

Until this legal controversy is resolved, there is going to continue to be uncertainty on the part of communities trying to deal with their garbage crisis with regard to what ultimate requirements and cost will be for their municipal and waste management.

We very much support an approach such as the one taken in H.R. 2162, which would provide clear authority to the EPA to regulate municipal combustor ash as a special waste under subtitle D of RCRA.

*Id.* at 33 (testimony of Sylvia Lowrance).

So there you have it. In construing a statute, we ordinarily have many tools at our disposal: the language and apparent purpose of the statute, its background and structure, its legislative history, and the bearing of related statutes. What we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency. Where do we turn? The see-sawing statements from the EPA to which the district court gave "little weight" deserve no weight at all. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, included the generation of waste within the household waste exclusion. Can we just ignore the Report, even though the word "generating" is nowhere to be found in the enacted statute?

It has been argued, both in this circuit and, most notably in the Supreme Court opinions of Justice Antonin Scalia, that recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor. Justice Scalia has written that use of legislative history

is neither compatible with our judicial responsibility of assuring reasoned, consistent and effective application of [statutes], nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress had in mind.

*Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J. concurring in part and concurring in the judgment). And as our Brother Easterbrook has noted regarding pre-enactment legislative history,

[i]t is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history . . . , because it becomes a crutch . . . , because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process).

*Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989). In addition, post-enactment statements, such as we have here, bear no necessary relationship to the forces at work at the time of enactment: the preferences of the enacting legislator and his or her constituency and the impact of pressure groups.

Every time Congress enacts legislation, it is acting in context. Although "[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words



would be understood," *Sinclair*, 870 F.2d at 1342, statements made before and after enactment are not necessarily the final word as to meaning. Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word "generation" was not used in the final product. Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't. The actual words of the statute—the end product of the rough-and-tumble of the political process—are the definitive statement of congressional intent.

Our task becomes simpler if we just begin with what the statute actually says. See *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 3001(i) mentions "the treating, storing, disposing of or otherwise *managing*" of the household and commercial waste," but fails to include among these activities *generating* a different waste product entirely. To borrow a phrase from computer programmers, resource recovery quite literally is "garbage in, garbage out," but the "garbage" that emerges from the incineration process—ash—is fundamentally different in its chemical and physical composition from the plastic, paper, and other rubbish that goes in. It does not follow that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste. Such a reading of section 3001(i) would be inconsistent with RCRA's policy of encouraging the careful management of materials that pose a danger to human health and the environment.

Moreover, contrary to the City's assertions, "otherwise managing" and "generating" are not coextensive terms. Statutory construction is a holistic endeavor: the only permissible meaning is that which is compatible with the "flesh and bones" of a law, from its overarching purpose down to its individual words. Here, the individual words

in RCRA are so carefully defined, they cannot be interchangeable. Hazardous waste "management" is defined to include a limited number of activities, including the "collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). The statute goes on to define some of these terms. Two of the most important words for our purposes are defined in the following manner. "Treatment" means:

any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any physical activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34). The term "disposal" means:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). These definitions exclude "generation," which is separately defined as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6). There is no overlap whatsoever, then, between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.



We should take at face value a statute's plain language so long as our reading is not absurd; we should ignore a legislative history that results in a reading that is. It is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills. Accordingly, we hold that the ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. The decision of the district court is

REVERSED.

RIPPLE, *Circuit Judge*, dissenting. For the reasons set forth in *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991), I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of  
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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No. 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC. and  
CITIZENS FOR A BETTER ENVIRONMENT,  
*Plaintiffs,*

vs.

CITY OF CHICAGO and RICHARD M. DALEY,  
Mayor of the City of Chicago,<sup>1</sup>  
*Defendants.*

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MEMORANDUM AND ORDER

Plaintiffs Environmental Defense Fund, Inc. (EDF) and Citizens for a Better Environment (CBE) bring this action against the City of Chicago and its Mayor, seeking injunctive relief and civil penalties under Section 7002 of the Resource Conservation and Recovery Act (RCRA). Plaintiffs allege that the City has violated certain provisions of RCRA, 42 U.S.C. § 6901 *et seq.*, by generating hazardous waste and not complying with the hazardous waste requirements under RCRA, subtitle C. 42 U.S.C. §§ 6921-6939(b). We have before us plaintiffs' and defendants' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, both motions are denied and plaintiffs are granted leave for additional discovery.

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<sup>1</sup> Pursuant to Fed.R.Civ.P. 25(d) Richard M. Daley is substituted as a defendant in this action. He succeeds Eugene Sawyer as Mayor of the City of Chicago.

FACTS

The City is the owner and operator of a facility known as the Chicago Northwest Incinerator, located at 700 N. Kilbourn Avenue in Chicago. This was one of the first modern waste-to-energy resource recovery facilities in the United States and is the only such facility in Illinois (aff. of John Ellis, plant manager, Dept. of Streets and Sanitation, Chicago, at ¶ 3). Resource recovery facilities use highly engineered and controlled incineration technology to process solid wastes, reducing their volume and recovering usable energy in the form of steam or electricity (aff. of Mosi Kitwana, Deputy Commissioner of Sanitation, Chicago, at ¶ 10). The Northwest facility receives 200 to 250 truckloads of refuse each weekday and processes some 350,000 tons of solid municipal waste annually (Ellis aff. ¶ 7). According to Mr. Kitwana, at least 99% of the waste received at the facility consists of household waste (Kitwana aff. ¶ 14). The remainder of the waste consists of commercial waste—primarily paper and foodstuffs brought into the United States by international flights arriving at O'Hare Airport—and small quantities of contraband seized by law enforcement officials (Kitwana aff. ¶ 14). The City contends that this waste, and the small amounts of commercial waste collected in Chicago, do not contain hazardous materials.

The facility is supposed to maintain rigid inspection procedures. Household waste shipments are allegedly spot-checked to ensure that they do not contain hazardous wastes and commercial shipments carefully screened—all to prevent the acceptance of hazardous wastes (Kitwana aff. ¶ 15). Commercial waste shipments must also be approved by the Bureau of Sanitation prior to acceptance. Finally, all commercial waste is supposed to be physically examined and any hazardous materials found are to be sent back to the generator for proper disposal (Kitwana aff. ¶ 15).

Once the waste has been delivered, and inspected for hazardous materials, it is processed through the facility

and reduced to an ash residue. The status of this ash is what is at issue in this matter. Plaintiffs allege that the ash is hazardous waste<sup>2</sup> and that the City has failed to comply with the cradle-to-grave regulatory system that governs storage, transport, disposal, and other handling of hazardous wastes. See 42 U.S.C. §§ 6921 *et seq.*; 40 CFR §§ 262.10 *et seq.*

The City contends that the ash remaining after incineration at the Northwest facility is from a non-hazardous waste stream and thus exempt from hazardous waste regulations. It moves for summary judgment alleging that there are no genuine issues of material fact in dispute, and that 49 U.S.C. § 6921(i) and 49 CFR § 261.4 (b)(1) specifically exclude all waste management activities of resource recovery facilities that receive household waste and non-hazardous commercial waste. On cross-motions, plaintiffs contend that the generation of toxic ash is not exempt from hazardous waste regulation and that only certain activities of resource recovery facilities are exempt.

### DISCUSSION

The central issue in this action is whether the ash residue remaining after incineration is a hazardous waste under subtitle C, or only a solid waste regulated under subtitle D. Statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. Plaintiffs contend that toxic ash generated by resource recovery facilities is hazardous and subject to hazardous waste regulation. Defendants, on the other hand, contend that ash remaining after the incineration of household and non-hazardous commercial waste is exempt from subtitle C regulation. We agree.

<sup>2</sup> Plaintiffs contend that 32 samples of ash generated at the Northwest Facility have been tested for toxicity pursuant to the EP toxicity test. Of those samples, 29 have exhibited levels of lead and/or cadmium that exceed the level qualifying it as hazardous waste (pl. cplt. ¶ 15).

The Resource Conservation and Recovery Act was enacted by Congress to address our growing national solid waste crisis, to promote the protection of health and the environment, and to conserve valuable material and energy resources. 42 U.S.C. § 6902. The RCRA classifies wastes as either hazardous (regulated under C, 42 U.S.C. §§ 6921-6939(b)) or as non-hazardous (regulated under D, 42 U.S.C. §§ 6941-6949(a)). Subtitle C imposes rigorous safeguards and procedures on hazardous waste management, while D essentially forbids the disposal of solid waste in open dumps and provides significantly less regulation than C. When Congress first enacted the RCRA in 1976 it did not initially identify which wastes were subject to hazardous waste regulation. Rather, it required the EPA to develop and promulgate criteria for identifying hazardous wastes. 42 U.S.C. § 6921(a). In 1980 the EPA issued regulations identifying and listing hazardous wastes. Included in these regulations was a provision known as the "household waste exclusion." 45 Fed.Reg. 33,120 (May 19, 1980). That provision exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation and provided, in pertinent part, as follows:

#### § 261.4 EXCLUSIONS

(b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)



45 Fed.Reg. 33,120 (May 19, 1980) (codified as amended at 40 CFR § 261.4(b)(1) (1982)).

In the preamble to these regulations the EPA restated its view that ash from the incineration of household waste should be excluded from hazardous waste regulation, stating:

The Senate language makes clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded in all phases of its management, *residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as a hazardous waste*. Such wastes, however, must be transported, stored, treated and disposed in accord with the applicable state and federal requirements concerning the management of solid waste . . . .

45 Fed.Reg. 33,098 (May 19, 1980) (emphasis added). When Congress amended the RCRA in 1984 to clarify the household waste exclusion, it left unmodified the EPA's 1980 interpretation that ash from the incineration of household waste should be excluded from hazardous waste regulation. 42 U.S.C. § 6921(i). Additionally, Congress expanded this exclusion to include resource recovery facilities that also burn non-hazardous commercial or industrial solid waste. The statute currently reads:

(i) *Clarification of Household Waste Exclusion*

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i) (1984).

The fact that Congress amended the RCRA without directly renouncing the EPA's 1980 interpretation that ash from household waste is excluded from hazardous waste regulation is significant. "Congressional failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), *rev'd on other grounds*, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981)). Congress having left untouched the EPA's 1980 interpretation is persuasive evidence that it intended to exclude ash such as this from subtitle C regulation.

Plaintiffs argue, however, that Congress did not intend the household waste exclusion to apply to generators of hazardous wastes such as defendants. According to plaintiffs, the 1984 amendment exempts only certain activities of resource recovery facilities (namely the treating, storing, disposing of or otherwise managing certain specified

wastes) and does not exclude the generation of hazardous waste. Indeed, the current RCRA statute contains no language indicating that waste such as ash, generated by resource recovery facilities, should be excluded from hazardous waste regulation. Therefore, plaintiffs' claim that defendants must comply with the RCRA's hazardous waste requirements because the ash defendants are generating is hazardous. We find this reasoning unpersuasive.

When Congress amended the RCRA and clarified the household waste exclusion, it meant to exclude all of the waste management activities of a resource recovery facility from subtitle C regulation. This interpretation is consistent with the RCRA's stated policy goal of encouraging commercially-viable resource recovery facilities and removing impediments which may hinder their development and operation. The Senate Report which accompanied the 1984 RCRA amendments supports this reading and, in fact, defines the waste management activities of a resource recovery facility to include generation. The report provides that

[a]ll waste management activities of [resource recovery facilities,] including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .

S.Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

That the EPA 1980 household waste exclusion does not include the words "generation" or "ash," but nevertheless excludes the generation of ash from hazardous waste regulation, provides further support that Congress meant to exclude ash generated from household waste from subtitle C. See 45 Fed.Reg. 33,120 (May 19, 1980). Plaintiffs do not dispute that the EPA initially interpreted the household waste exclusion as excluding all of the waste management activities of municipal incinerators accept-

ing only household wastes. In fact, plaintiffs concede that the 1980 household waste exclusion was a "waste stream" exclusion (pl. mem. at 20). Nonetheless, plaintiffs contend that the 1984 RCRA statute does not pertain to the entire waste stream but, rather, is limited to a class of resource recovery facilities that must meet certain requirements. We disagree. Because the original household waste exclusion covered the management of ash residue, and the 1984 clarification left untouched this interpretation, we conclude that Congress must have meant to adopt the EPA's position. Had Congress intended to change this interpretation, it would have so indicated in the 1984 amendment.

The United States Conference of Mayors and the National Resource Association have filed an amicus brief in support of the City's position and the Institute of Resource Recovery has done likewise.<sup>3</sup> They claim that landfill capacity for hazardous wastes is limited, is being rapidly depleted and is not being replaced, and that a requirement that ash be disposed of as a hazardous waste would imperil the entire resource recovery program. Plaintiffs dispute that gloomy assessment. Whether that assessment is true or not, we are not persuaded that Congress changed obligations by implication and without specifically addressing and rejecting those concerns.

Since the 1984 amendment, the EPA has issued new regulations interpreting the household waste clarification provision. 40 CFR 261.4(b)(1) (1985). Plaintiffs argue that these regulations provide further support that Congress did not intend to exclude the generation of ash from hazardous waste regulations. In the preamble to these regulations, the EPA seemed to believe that the 1984 statute modified the earlier policy on ash. The EPA stated that it did not see the 1984 amendments as an attempt

<sup>3</sup> We here grant their motions to file those briefs.



to exempt the regulation of ash residue.<sup>4</sup> See 50 Fed.Reg. 28,726 (1985). Recent statements from some EPA officials, following the issuance of the 1985 regulations, have also indicated that the EPA does not consider ash to be exempt from hazardous waste regulation. See Testimony of Sylvia Lowrance, Director, Office of Solid Waste, EPA, at *Regulation of Municipal Solid Waste Incinerators: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Congress, 1st Session (May 11, 1989).

Other EPA officials who have examined the 1985 interpretation have concluded that that interpretation, however, may have been in error. On December 3, 1987, J. Winston Porter, assistant administrator for Solid Waste and Emergency Response, testified before the Senate Committee on Environment and Public Works and stated that

<sup>4</sup> The EPA interpreted the clarification as follows:

The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of those resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metal becomes concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes could not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

50 Fed.Reg. 28,725-26 (7/15/85).

[t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) [42 U.S.C. § 6921(i)] were probably intended to exclude these ash residues from regulation under Subtitle C.

It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion . . . ."

S.Rep. at 61.

In addition, after stating in the 1985 interpretation that it did not perceive the RCRA amendments as an attempt to exempt the regulation of ash residue, the EPA indicated its confusion on the matter by stating that it

does not believe the HSWA [1984 Hazardous and Solid Waste Amendments] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed.Reg. 28, 726 (1985).



As the agency primarily responsible for administering the RCRA, the EPA should be entitled to some deference in its interpretations regarding the regulation of ash residue. However, because the EPA's classification of ash rests on a questionable reading of the statute and has been, at best, inconsistent, it should be given less weight than it would normally be accorded.<sup>5</sup> See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1986) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view"). For this reason, we find that the EPA's 1985 interpretation—classifying ash from household and commercial waste as hazardous if it exhibits characteristics of toxicity—does not affect our decision.

Thus, contrary to plaintiffs' interpretation of RCRA, we conclude that ash remaining after the incineration of household waste and non-hazardous commercial waste is exempt from regulation if the resource recovery facility satisfies the criteria of § 3001(i).

Defendants insist that the Chicago Northwest Incinerator does meet those criteria and have submitted affidavits to the effect that virtually all the waste received and burned is household waste, that the very limited commercial and industrial waste processed does not contain hazardous wastes, that the facility does not accept hazardous wastes and that appropriate procedures are in place to assure that hazardous wastes are not received at or burned in the facility. Plaintiffs dispute those conclu-

<sup>5</sup> Even if the EPA's 1985 interpretation was entitled to deference in these proceedings, it would not be binding on this court. "Interpretative rules are statements as to what the administrative officer thinks the statute or regulation means, whereas legislative rules have effects *completely independent* of the statute." *United Technologies Corp. v. United States Environmental Agency*, 831 F.2d 714, 718 (D.C. Cir. 1987) (citations omitted) (emphasis in original).

sions but they can, for now, point to little other than the toxicity tests to support their disagreement. Until now the focus of this lawsuit has been the statutory interpretation issue. Plaintiffs have lost on that issue. They are not foreclosed, however, from conducting reasonable discovery to test the defendants' affidavit assertions. Rule 56(f) so permits. Until they have had an opportunity to do so, we cannot conclude that defendants, beyond reasonable dispute, have complied with the conditions needed to exempt resource recovery facilities from hazardous waste regulation when burning household and commercial waste. Although defendants maintain that the incinerator does not accept hazardous wastes, and that they have established sufficient notification and inspection procedures to prevent this, these issues must be regarded as disputed issues of material fact that preclude the award of summary judgment.

### CONCLUSION

For the foregoing reasons, both plaintiffs' and defendants' cross-motions for summary judgment are denied; plaintiffs are granted leave for additional discovery.

/s/ James B. Moran  
JAMES B. MORAN  
Judge  
United States District Court

November 29, 1989.

34a

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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Case Number: 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*

v.

CITY OF CHGO *et al.*

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JUDGMENT IN A CIVIL CASE

[Docketed Aug. 21, 1990]

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That based upon the Memorandum and Order of November 27, 1989, the stipulation of the parties and defendants' renewed motion for summary judgment, the renewed motion for summary judgment is granted, without prejudice to plaintiffs' right to appeal the final judgment entered herein.

Dated: August 20, 1990

H. STUART CUNNINGHAM  
Clerk

/s/ Willie A. Haynes  
WILLIE A. HAYNES  
(By) Deputy Clerk

35a

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

---

No. 88 C 0769

Judge James B. Moran

ENVIRONMENTAL DEFENSE FUND, INC. and  
CITIZENS FOR A BETTER ENVIRONMENT,  
*Plaintiffs,*

v.

CITY OF CHICAGO, *et al.*,  
*Defendants.*

---

STIPULATION OF PLAINTIFFS ENVIRONMENTAL  
DEFENSE FUND AND CITIZENS FOR A BETTER  
ENVIRONMENT AND DEFENDANTS  
CITY OF CHICAGO ET AL.  
WITH REGARD TO ENTRY OF SUMMARY  
JUDGMENT IN FAVOR OF DEFENDANTS

1. On November 27, 1989, this Court ruled herein that, as a matter of law, ash generated by the Northwest Waste-to-Energy Facility ("Facility") owned by defendant City of Chicago is exempt from regulation as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act ("RCRA") if defendants meet the two statutory conditions set forth in section 3001(i) of RCRA. Memorandum Opinion and Order of November 27, 1989. Those conditions pertain to the existence of contracts or other appropriate procedures to assure that the Facility does not receive or process hazardous wastes, and to non-acceptance of hazardous wastes by the Facility. The Court directed the parties to engage in discovery

with regard to whether the Facility meets these two statutory conditions.

2. Subsequent to issuance of the Court's Memorandum and Order, discovery has been completed.

3. Defendants stipulate that, within 60 days of the entry of this Stipulation they will implement the changes specified in Attachment A to this Stipulation.

4. Contingent upon defendants' performance of the condition stated in paragraph 3 of this Stipulation, plaintiffs hereby stipulate that they will not contest, challenge, or otherwise pursue in this litigation:

(a) the adequacy of the Facility's current procedures for excluding hazardous wastes;

(b) whether the Facility currently accepts hazardous wastes for processing;

(c) the adequacy of the Facility's prior procedure for excluding hazardous wastes;

(d) whether the Facility previously accepted hazardous wastes for processing.

5. Contingent upon defendants' performance of the conditions stated in paragraph 3 of this stipulation, plaintiffs further stipulate that they will not oppose a renewed motion by defendants for entry of summary judgment in favor of defendants. In so stipulating, plaintiffs expressly reserve their right to appeal the final judgment insofar as the judgment rests upon the rulings set forth in the Court's Order and Memorandum of November 27, 1989.

Respectfully submitted,

/s/ Karen Florini  
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Dated: July 2, 1990

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Counsel For Defendants

June 27, 1990



## ATTACHMENT A

To the Acceptable Waste Certification form used by the City of Chicago at the Northwest Waste-to-Energy Facility, the following material underlined shall be added to the form, and material bracketed shall be deleted as follows:

"Hazardous waste defined as a waste or combination of wastes, which has been identified by characteristic or listing as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board, [and which poses a threat to health and safety].

". . . .

"Oil, cesspool or other human wastes . . . and *small quantity generator wastes as defined at 40 C.F.R. sec. 260.10.*"

CITY OF CHICAGO  
DEPARTMENT OF STREETS AND SANITATION  
ACCEPTABLE WASTE CERTIFICATION

DATE MONTH DAY YEAR

I understand that the Northwest Waste-to-Energy Facility accepts only household waste and non-hazardous and otherwise acceptable commercial and Industrial waste, and that under no circumstances will the Northwest-Waste-to-Energy Facility accept any of the following unacceptable waste:

Hazardous waste, defined as a waste or combination of wastes which has been identified, by characteristic or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board.

Any waste which because of its nature or bulk will adversely affect operation of the facility.

Oil, cesspool or other human wastes, human and animal remains, hospital or medical waste, wire and cable, tree logs and wood greater than twelve inches in diameter, liquid waste, non-burnable construction material and/or demolition debris, asbestos and asbestos products, explosives including ammunition and fire arms, chemicals including any empty containers thereof, such as cleaning fluid, flammables, petroleum products including drained oils, paints, acids, caustics, pesticides, insecticides, poisons, drugs, and small quantity generator wastes as defined in the resource conservation and recovery Act (RCRA) at 40 C.F.R. section 260.10.

I hereby certify that the waste delivered in this vehicle contains no unacceptable waste, as defined above. I understand that should the operators of the Northwest Waste-to-Energy Facility discover unacceptable waste in

40a

this vehicle, that it will not be disposed of at the Northwest Waste-to-Energy Facility and must be returned to the owner.

\_\_\_\_\_  
DRIVER \_\_\_\_\_ TIME STAMP

VEHICLE LICENSE NO. \_\_\_\_\_

WASTE AUTHORIZATION FORM # \_\_\_\_\_  
\_\_\_\_\_

41a

[SEAL]

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
Washington, D.C. 20460

[Sept. 18, 1992]

The Administrator

MEMORANDUM

TO: All Regional Administrators  
SUBJECT: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)

PURPOSE

This Memorandum sets forth the United States Environmental Protection Agency's ("EPA" or "Agency") decision under section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i),<sup>1</sup> to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities (hereinafter "MWC ash") as exempt from hazardous waste regulation under RCRA Subtitle C. EPA believes that MWC ash can be regulated in a manner that will be protective of human health and the

<sup>1</sup> As part of the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA by adding section 3001(i), which provides, in pertinent part:

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for purposes of regulation under [Subtitle C] if . . . such facility . . . receives and burns only . . . household waste . . . and solid waste from commercial or industrial sources that does not contain hazardous waste . . . .

RCRA section 3001(i)(1), 42 U.S.C. § 6921(i)(1). Section 3001(i) is codified in EPA's regulations as part of the household waste exclusion. 40 C.F.R. 261.4(b)(1).

environment under RCRA Subtitle D. The determination set forth herein supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. *See* 50 Fed. Reg. 28702, 28725-26 (1985).

## ANALYSIS

### *Text of the Statute*

EPA's determination that MWC ash is exempt from hazardous waste regulation is consistent with the text of section 3001(i). As proclaimed by the title of section 3001(i)—“Clarification of household waste exclusion”—in enacting that provision, Congress was building upon the regulatory framework it earlier had established. In enacting RCRA in 1976, Congress indicated that solid waste from households, which frequently includes materials that may contain hazardous constituents, should not be regulated as hazardous waste under Subtitle C. S. Rep. No. 94-988, 94th Cong., 2d Sess. 16 (1976). EPA codified Congress' intent in the so-called “household waste exclusion,” promulgated in 1980, which provides that “any material . . . derived from households . . . is not hazardous waste . . . .” 40 C.F.R. 261.4(b)(1).

In the preamble to the Federal Register notice announcing the household waste exclusion, EPA clearly stated that the exclusion extends to ash remaining after household waste is incinerated: “Since household waste is excluded in all phases of its management, residues after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.” 45 Fed. Reg. 33066, 33098 (1980). The Agency justified its determination that ash derived from the incineration of household waste is subject to the exclusion on the ground that Congress intended to “exclude waste streams generated by consumers at the household level.” *Id.* (emphasis added).

In enacting section 3001(i), Congress arguably extended the regulatory exclusion for ash derived from the incineration of household waste to similar residues generated by resource recovery facilities from the incineration of household waste *and* nonhazardous commercial and industrial solid waste. To the extent that household waste alone is incinerated, section 3001(i) coincides with EPA's earlier interpretation of the household waste exclusion as exempting ash derived from such waste from hazardous waste regulation. The inclusion in section 3001(i) of nonhazardous commercial and industrial waste, along with household waste, suggests that Congress may have intended that MWC ash resulting from the combustion of those combined wastes also should not be subject to regulation as a hazardous waste.

In addition, congressional intent to exempt MWC ash from hazardous waste regulation is suggested by the portion of section 3001(i) which provides that a resource recovery facility shall not be deemed to be “treating, storing, disposing of, or otherwise managing” hazardous waste. (Emphasis added.) Nothing ordinarily is “disposed of” when a resource recovery facility receives or stores a nonhazardous solid waste, and the burning of such waste generally is regarded as a type of treatment under RCRA. *See* RCRA sections 1004(3) and (34), 42 U.S.C. § 6903(3) and (34) (definitions of “disposal” and “treatment”). As a result, since MWC ash ordinarily is the only waste “disposed of” by such a facility, Congress arguably intended that MWC ash not be regarded as a hazardous waste.

For the foregoing reasons, EPA believes that the text of section 3001(i) is consistent with the Agency's determination that MWC ash is exempt from hazardous waste regulation.



### Legislative History

EPA's determination that MWC ash is exempt from hazardous waste regulation also is consistent with the legislative history of section 3001(i). First, a Report of the Senate Committee on Environmental and Public Works addressing section 3001(i) specifically states that "[a]ll waste management activities of such a [resource recovery] facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."<sup>2</sup> S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).<sup>3</sup> Since MWC ash ordinarily is the only waste "generated" by a resource recovery facility, Congress arguably demonstrated its intent that MWC ash not be regarded as a hazardous waste.

Second, the Senate Report states that section 3001(i) was enacted to "encourage commercially viable resource recovery facilities and . . . remove impediments that may hinder their development and operation." S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983). As noted

<sup>2</sup> Unlike the legislative history for section 3001(i), the statute does not expressly state that the "generation" of waste by a resource recovery facility is included within the exemption. At most, the absence of that term reflects that Congress did not expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that MWC ash be regulated as a hazardous waste. In such a circumstance, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein, as discussed more fully below.

<sup>3</sup> The Senate Report is entitled to special weight because the Conference Committee adopted, without change, the Senate version of section 3001(i). H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5677. In passing the Senate version of section 3001(i), Congress also impliedly adopted the Senate's interpretation of that provision set forth in the Senate Report.

above, one of the significant features of section 3001(i) is that it applies to resource recovery facilities that burn both household waste *and* nonhazardous commercial and industrial waste. If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report could be substantially frustrated. As a practical matter, the cost benefit to a resource recovery facility in being able to burn both household and nonhazardous commercial and industrial waste would be significantly reduced if MWC ash must be disposed of as a hazardous waste, as discussed more fully below.

Third, the Senate Report refers to the wastes being incinerated in resource recovery facilities as "waste streams," as follows:

Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous *waste streams* from a variety of sources other than "households." . . . New section 3001[i] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

*Id.* (emphasis added). As noted above, the Agency justified its determination that ash derived from the incineration of household waste is excluded from hazardous waste regulation on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." 45 Fed. Reg. 33066, 33098 (1980) (emphasis added). In also using the term "waste stream" in the Senate Report, Congress arguably demonstrated its intent that section 3001(i) be construed as extending the household "waste stream" exclusion to the entire "waste stream" at a resource recovery facility, including MWC

ash derived from the burning of combined household and nonhazardous commercial and industrial waste.

In sum, the legislative history of section 3001(i) is consistent with the Agency's determination to exempt MFC ash from hazardous waste regulation.

#### *Policy Considerations*

As discussed above, EPA believes that the text and legislative history of section 3001(i) are consistent with the Agency's view that MWC ash is exempt from hazardous waste regulation. Since Congress did not in the statute or legislative history expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein. EPA believes that the two statutory goals embodied in section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste—are best served by exempting MWC ash from hazardous waste regulation.

EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D. In particular, EPA recently promulgated new criteria for municipal solid waste landfills at 40 C.F.R. Part 258, 56 Fed. Reg. 50978 (1991). Municipal landfills and monofills receiving MWC ash must comply with those criteria.<sup>4</sup> The Part 258 cri-

<sup>4</sup> In the preamble to the Federal Register notice announcing the final Part 258 criteria, EPA stated that "[t]he purpose of part 258 is to establish minimum national criteria for municipal solid waste landfills, including [such landfills] used for . . . disposal of non-hazardous municipal waste combustion (MWC) ash (whether the ash is co-disposed or disposed of in an ash monofill)." See also response to comment document nos. 155, 168, 171, 172, and 199 in the public record for the Part 258 rulemaking (docket number F-91-CMLF-FFFFF).

teria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure care requirements. The Agency believes the disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment.<sup>5</sup>

If information comes to EPA's attention suggesting that MWC ash is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations. In addition, at individual sites, if the disposal of MWC ash may present an imminent and substantial endangerment to human health or the environment, EPA may require responsible persons to undertake appropriate action under section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

Resource recovery from municipal solid waste is an important component of EPA's integrated waste management approach, which involves the complementary use of a variety of practices to safely and effectively manage municipal solid waste.<sup>6</sup> Such activity advances the statu-

<sup>5</sup> The promulgation of the Part 258 criteria is an important step in ensuring that MWC ash can and will be regulated in a manner that will be protective of human health and the environment under Subtitle D. The promulgation of those criteria also has served as an impetus for the Agency's reevaluation of its earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. 50 Fed. Reg. 28702, 28725-26 (1985).

<sup>6</sup> That approach establishes a hierarchy that prefers source reduction (i.e., the design, manufacture, purchase, or use of materials to reduce the amount or toxicity of solid waste generated) and recycling (i.e., the process by which materials are collected and used



tory objective of RCRA (the *Resource Conservation and Recovery Act*) to reduce the volume of waste that requires disposal. *See id.* at section 1002(b)(8), 42 U.S.C. § 6901(b)(8). It also advances the statutory objective of recovering significant amounts of energy from solid waste. *See id.* at sections 1002(d)(2), 42 U.S.C. § 6901(d)(2), and 1003(a)(11), 42 U.S.C. § 6902(a)(11). For those reasons, EPA agrees with Congress' view, set forth in the Senate Report discussed above, that impediments hindering the development and operation of commercially viable resource recovery facilities should be eliminated where practicable.

For nonhazardous municipal solid waste that can be disposed of either in a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of those two alternatives significantly is impacted by the application of section 3001(i) to MWC ash.<sup>7</sup> If MWC ash is not exempt under 3001(i) from hazardous waste regulation, a strong economic incentive may exist to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust that waste in resource recovery facilities. The costs associated with the disposal of MWC ash in Subtitle C facilities are dramatically higher than in Subtitle D landfills. Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold differ-

as raw materials for new products) over solid waste combustion (including combustion for resource recovery) and landfilling. Solid waste combustion, however, has played and will continue to play an important role in the Agency's integrated waste management approach because the entire solid waste stream cannot be reduced through source reduction and recycling. EPA encourages communities to choose the mix of solid waste options that are most appropriate for them, considering local economic, environmental, and other factors.

<sup>7</sup> In addition to cost, Subtitle D landfill capacity limitations also may be a significant factor in determining whether municipal solid waste is combusted in resource recovery facilities.

ence between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

## CONCLUSION

In sum, exempting MWC ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste. For the foregoing reasons, EPA has determined that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

/s/ William K. Reilly  
WILLIAM K. REILLY

cc: Don T. Clay, Assistant Administrator  
Office of Solid Waste and Emergency Response  
(OS-100)

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No. 92-1639

**In the Supreme Court of the United States**

OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,  
Petitioners

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,  
Respondents

**On Petition For A Writ Of Certiorari To  
The United States Court Of Appeals  
For The Seventh Circuit**

**BRIEF FOR RESPONDENTS**

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**BEST AVAILABLE COPY**

## QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), exempts a resource recovery facility, which generates a hazardous waste ash residue from its incineration of municipal solid waste, from the requirements of Subtitle C of RCRA applicable to hazardous waste generators.

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**On Petition For A Writ Of Certiorari To  
The United States Court Of Appeals  
For The Seventh Circuit**

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**BRIEF FOR RESPONDENTS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-4a) following this Court's remand to that court is reported at 985 F.2d 303 (7th Cir. 1993). The initial opinion of the court of appeals (Pet. App. 5a-21a) is reported at 948 F.2d 345 (7th Cir. 1991). The district court's memorandum opinion and order of November 29, 1989 (Pet. App. 22a-33a) is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

**JURISDICTION**

The judgment of the court of appeals was entered on January 12, 1993. The court of appeals issued a published opinion on January 29, 1993. The petition for a writ of

certiorari was filed on April 12, 1993. The jurisdiction of this court is invoked under 28 U.S. 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(i), provides:

#### (i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, sorting, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--

- (1) such facility--
  - (A) receives and burns only--
    - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
    - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
  - (B) does not accept hazardous waste identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7) provide:

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

### STATEMENT

Respondents Environmental Defense Fund, Inc. and Citizens For A Better Environment brought this action, asserting that petitioner City of Chicago<sup>1</sup> is violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to comply with that Act's Subtitle C hazardous waste requirements in the City's handling of the hazardous waste ash residue generated by its operation of a municipal solid waste facility.<sup>2</sup> The district court granted the City's motion for summary judgment, agreeing with the City that Section 3001(i) of RCRA exempts the City's resource recovery facility, and the ash generated by it, from Subtitle C's requirements

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<sup>1</sup> Petitioners City of Chicago and Richard M. Daley, Mayor of the City of Chicago, are referred to collectively in this submission as either "the City" or "petitioner."

<sup>2</sup> Subtitle C of RCRA establishes a regulatory scheme governing those "solid wastes" that constitute "hazardous wastes" and Subtitle D imposes a distinct, less rigorous, regulatory regime on "solid wastes" that are not "hazardous." Compare 42 U.S.C. 6921-6939 (Subtitle C) with 42 U.S.C. 6941-6949 (Subtitle D).



applicable to hazardous waste generators. The court of appeals reversed. This Court subsequently granted a petition for a writ of certiorari filed by the City, vacated the judgment below, and remanded the case to the court of appeals for reconsideration in light of the views expressed by the Administrator of the United States Environmental Protection Agency in a memorandum to regional administrators dated September 18, 1992. On remand, the court of appeals reinstated its earlier judgment.

1. The City of Chicago owns and operates a municipal solid waste resource recovery facility at which it incinerates solid waste collected from households and commercial enterprises located throughout the City. The resource recovery facility receives 200 to 250 truckloads of refuse each day, totalling 350,000 tons of waste per year. The facility in turn generates 110,000 to 140,000 tons of ash, the toxicity of which is routinely high enough to qualify it as a "hazardous waste" subject to the requirements of Subtitle C of RCRA. Between 1981 and 1987, 32 out of 35 samples of ash tested exhibited sufficiently high leachable concentrations of lead, cadmium, or both to be classified a hazardous waste under established EPA testing procedures. Pet. App. 6a.

The City, however, has not in the past, and does not currently comply with Subtitle C in its transportation, storage, or disposal of the hazardous ash. Pet. App. 6a-7a. The City has not, as is required of generators of hazardous waste, applied for and received a United States Environmental Protection Agency identification number prior to engaging in any of these regulated activities with the ash that the City has generated. See 40 C.F.R. 262.12. The City likewise does not purport to comply with packaging and labelling requirements, or with container requirements, applicable to hazardous wastes. See

40 C.F.R. 262.30-33.

Nor does either the waste hauler hired by the City to transport the hazardous ash, or any of the facilities at which the ash has been ultimately disposed, hold a permit to accept hazardous waste. Until 1987, the City sent its ash to a former limestone quarry, which lacked any liner. R12 at ¶ 16.<sup>3</sup> The City currently sends the ash to a sanitary landfill in Michigan that fails to conform with the basic design elements of hazardous waste landfills. R.34 at ¶ 24. Among other shortcomings, there is no double liner or leachate collection and detection system, both of which are required in licensed hazardous waste landfills to guard against the migration of hazardous constituents into any nearby groundwater supplies. *Id.*

2. On January 27, 1988, respondents filed a complaint against the City, alleging that the City was violating Subtitle C of RCRA by unlawfully storing, transporting, disposing, and otherwise handling hazardous ash generated at the City municipal solid waste resource recovery facility. The City filed a motion for summary judgment, relying on RCRA Section 3001(i), which provides that a resource recovery facility that receives and burns only household waste and nonhazardous solid waste from commercial or industrial sources "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" to the extent that the facility is "recovering energy from the mass burning of municipal

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<sup>3</sup> "R12" refers to the item number in the record below. Record cities are derived from the brief filed by respondents in the court of appeals.

solid waste." 42 U.S.C. 6921(i).<sup>4</sup> The City did not contest respondents' claim that the concentrations of hazardous constituents in the ash render it a "hazardous waste," within the meaning of RCRA. Nor did the City contest respondents' assertion that the City was not complying with RCRA's Subtitle C requirements. Pet. App. 6a-7a, 23a-24a.

The district court granted the City's motion for summary judgment. Pet. App. 33a. The court concluded that Congress must have intended to exclude hazardous ash generated by the resource recovery process because in 1980, prior to congressional enactment of Section 3001(i) in 1984, EPA had "exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation." Pet. App. 25a, citing 45 Fed. Reg. 33120 (1980). According to the district court, "Congress having left untouched the EPA's 1980 regulation is persuasive evidence that it intended to exclude ash such as this from Subtitle C." Pet. App. 27a. The court declined to give any deference to EPA's official statement, made subsequent to Section 3001(i)'s enactment, that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." Pet. App. 29a-30a & n.4, quoting 50 Fed. Reg. 28725-28726 (1985).

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<sup>4</sup> Pursuant to Section 3001(i), the facility must not only be a "resource recovery facility," but in addition, the facility owner or operator must have an established program or procedure "to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. 6921(i).

3. The court of appeals reversed. Pet. App. 5a-21a. The court concluded that the district court's reliance on EPA's 1980 regulation was misplaced, because "Congress never ratified th[e 1980] statement in the form of legislation." *Id.* at 10a. Looking to "what the statute actually says," the court of appeals found dispositive that "Section 3001(i) mentions 'the treatment, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among those activities *generating* a different waste product." *Id.* at 18a (emphasis in original). "It does not follow," the court reasoned, "that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.*

The court also stressed that, "contrary to the City's assertions, 'otherwise managing' and 'generating' are not coextensive terms." Pet. App. 18a. They are each "carefully defined" in a way that prevents them from being "interchangeable." *Id.* at 19a. Hazardous waste "generation" is deliberately excluded from the statutory definition of "management," which is defined "to include a limited number of activities, including the 'collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.'" *Id.*, quoting 42 U.S.C. 6903(7). "It follows, therefore, that if the language of exclusion is limited to 'management' activities of resource recovery facilities, 'generating' activities are subject to regulation." Pet. App. 19a.<sup>5</sup>

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<sup>5</sup> Judge Ripple dissented. Pet. App. 21a.

4. On February 18, 1992, the City of Chicago petitioned (No. 91-1328) for a writ of certiorari. Respondents filed a brief in response that agreed that the writ should be granted, but contended that the judgment of the court of appeals should be affirmed. On May 18, 1992, the Court invited the views of the Solicitor General (112 S.Ct. 1932). In October 1992, the Solicitor General filed a brief recommending that the Court grant the petition, vacate the judgment below, and remand for reconsideration in light of a memorandum dated September 18, 1992, prepared by the EPA Administrator for distribution to regional EPA offices. That memorandum explained that EPA was adopting a new interpretation of Section 3001(i), under which ash generated from the combustion of municipal waste would not be considered subject to RCRA Subtitle C regulation. See Pet. App. 41a-49a.

Both the City of Chicago and respondents filed briefs opposing the Solicitor General's recommendation on the common ground that the court of appeals was not likely to modify its earlier judgment in light of EPA's latest pronouncement. On November 17, 1992, the Court adopted the Solicitor General's recommendation, granted the petition, vacated the court of appeals judgment, and remanded for reconsideration in light of EPA's memorandum. 113 S.Ct. 486 (1992).

5. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-4a. According to the court, the "plain language of the statute is dispositive." *Id.* at 3a. The court further explained that "EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers." *Id.* at 2a. Judge Ripple dissented. *Id.* at 3a-4a.

## DISCUSSION

The petition for a writ of certiorari should be granted. Although we believe that the judgment of the court of appeals should be affirmed, we agree with petitioner that the decision of that court conflicts with the decision of another court of appeals and that the existing conflict in the circuits presents an important issue of federal law warranting this Court's plenary review.

1. As correctly described by petitioner (Pet. 11), "[t]he Second and Seventh Circuits' interpretations of Section 3001(i) of RCRA remain diametrically opposed." The Seventh Circuit in this case held that Section 3001(i) does not exempt from RCRA Subtitle C's hazardous waste regulations the hazardous ash generated by a municipal resource recovery facility burning household waste and commercial nonhazardous waste. Rather, Section 3001(i) simply exempts the resource recovery facility's management of the household waste it *receives and burns*, notwithstanding the hazardous characteristics of that incoming household waste, as long as the facility operators take appropriate actions to ensure that any commercial or industrial waste mixed with that household waste is not itself hazardous. Where, however, as in this case, the incineration of that waste produces a new waste that itself is "hazardous," within the meaning of RCRA, Subtitle C's requirements apply to that new waste.

The Second Circuit in *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir.), cert. denied, 112 S.Ct. 493 (1991), embraced the opposite view. As described by the Seventh Circuit below, "[t]he Second Circuit \* \* \* concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a



hazardous waste." Pet. App. 8a, citing *Wheelabrator*, 931 F.2d at 213. The Seventh Circuit has in this case squarely rejected the Second Circuit's reasoning in *Wheelabrator* on two separate occasions. See Pet. App. 2a, 5a n.\*, 20a.

2. We also agree with petitioner that the regulatory scope of Subtitle C renders "intolerable" a circuit conflict regarding its application (Pet. 13). Subtitle C does not simply impose a set of requirements on geographically localized activities in different states. Subtitle C applies to companies engaged in commerce in hazardous waste treatment, storage, and disposal, much of which crosses state borders. Indeed, the very reason why Congress enacted RCRA and Subtitle C was the predominantly interstate nature of commerce in hazardous waste management. See H.R. Rep. 94-1491, 94th Cong., 2d Sess. 9-10, 24-28 (1976). Congress recognized that "uniformity" was an essential element of any comprehensive scheme designed to protect human health and the environment from the risks presented by such wastes. See *id.* at 30. The conflict between the Second and Seventh Circuits, however, destroys that essential element of the federal statutory scheme.

The existing circuit conflict also presents the kind of conflict that warrants this Court's resolution at this time. There is no reason to suppose that either of the two conflicting circuits may change its view, especially now in the aftermath of the Seventh Circuit's reaffirmation of its initial ruling in respondents' favor. Nor does the fact that Congress is currently contemplating RCRA's amendment in its reauthorization process provide any substantial basis for anticipating that Congress will address this issue in the near future, or indeed at any time. See Pet. 18-19 n.7. Congressional reauthorizations of federal environmental laws are notorious both for their prolonged delays, and the

unpredictability of their substantive amendments in the legislative process. RCRA is itself a good example. Its authorization for appropriations expired five years ago in 1988. See 42 U.S.C. 6916(a) (1988).<sup>6</sup>

3. We also agree with petitioner that this case presents an important issue of federal law warranting this Court's review, wholly apart from the practical problems presented by the conflict now existing between the Second and Seventh Circuits. The environmental consequences at stake, moreover, render this Court's review now particularly pressing.

As petitioner acknowledges (Pet. 3), there were 137 resource recovery facilities operating in the United States as of November 1991, and 68 additional facilities in the planning or construction stage. These facilities generate millions of tons of ash residue each year.<sup>7</sup> The facility at

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<sup>6</sup> Congress similarly needed 13 years (between 1977 and 1990) to reauthorize and amend the Clean Air Act, 42 U.S.C. 7401 *et. seq.*, which was supposed to be reauthorized after only four years. See 42 U.S.C. 7426 (1988).

<sup>7</sup> Petitioner exaggerates, however, the impact of the Seventh Circuit's ruling by wrongly assuming that all municipal incinerator ash would automatically be deemed "hazardous waste" under that court's view. See Pet. 10-11 & n.4. The hazardous nature of petitioner's ash is not disputed in this case, but that does not mean that all municipal incinerator ash will necessarily be hazardous in every case. Whether or not particular incinerator ash is hazardous waste will depend on whether the ash exhibits one of several identifying characteristics. See 42 U.S.C. 6921(a), (g), & (h) (1988). Indeed, the likely effect of an affirmance of the Seventh Circuit's view would be that municipalities will engage in recycling and material-diversion programs to keep toxic materials out of the incinerator and therefore the ash. The upshot might well be that none of the resulting ash will constitute hazardous waste.

issue in this case by itself generates up to 140,000 tons of ash each year. Pet. App. 6a. Under the Second Circuit's view, that ash, no matter how hazardous its composition, is exempt from the stringent requirements that Congress deemed essential for safeguarding human health and the natural environment.<sup>8</sup>

Hazardous ash from resource recovery facilities burning municipal solid waste is therefore currently being stored in a manner not deemed suitable for hazardous waste. The ash is being transported in a way that the government has determined is inadequate for hazardous waste. And, the ash is ultimately being disposed of in a manner that does not meet the minimum requirements

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<sup>8</sup> For that reason, moreover, the Second Circuit's view in *Wheelabrator* is doubly flawed. Not only did that court incorrectly conclude that Section 3001(i)'s exemption extends to the generation of hazardous ash, but the court also failed to consider the practical consequences of the regulatory regime that it was creating. Even assuming that the exemption does (contrary to our view) apply to the newly-generated ash, Section 3001(i) cannot fairly be construed as purporting to allow any party other than the resource recovery facility itself to entertain the fiction that the ash is not hazardous waste. The "resource recovery facility recovering energy from the mass burning of municipal solid waste" is the only entity mentioned in Section 3001(i) that "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle." 42 U.S.C. 6921(i). There is no parallel exemption for any other entity that is subsequently "treating, storing, disposing of, or otherwise managing" the hazardous ash. Of course, as petitioner would no doubt respond, such a bifurcated statutory exemption is unworkable and makes no sense (*e.g.*, how would a transporter know that it was receiving a hazardous waste if the Subtitle C manifest system requirements did not apply to the generator of the waste in the first place). But that is the very reason why it is wrong to suppose that Congress intended to extend the exemption to the generation of ash at all.

applicable to the disposal of wastes containing such hazardous constituents. In some instances, the inevitable harms that result from these dangerous practices may be susceptible to some remedial action, albeit at tremendous costs. In many others, however, the damage is likely to be irreversible both in terms of human health and the environment.

To be sure, the Seventh Circuit's favorable ruling reduces somewhat the magnitude of that threat. But, absent this Court's review, there will be no opportunity to challenge the practices of resource recovery facilities operating within the Second Circuit and thereby redress the growing threat that they present to persons exposed to their hazardous wastes. Hence, the seriousness of those risks further counsels against this Court's delaying review of the issue presented in this case.

4. Finally, although we agree that the petition should be granted, we believe that the decision of the court of appeals below is correct and its judgment should therefore be affirmed.

Petitioner's entire legal argument rests on the erroneous proposition that Congress intended to promote resource recovery facility incineration of municipal solid waste (*i.e.*, household waste and nonhazardous commercial waste) in two distinct ways: (1) exempt those facilities from the strict Subtitle C requirements applicable to those transporting, treating, storing, or disposing of hazardous wastes in the facilities' *receipt* of municipal solid waste for the purpose of recovering energy from its mass burning; and (2) exempt those facilities in their *production* of hazardous ash from the strict Subtitle C requirements applicable to those who generate a new hazardous waste,

even when those wastes would otherwise constitute "hazardous wastes," within the meaning of RCRA.

The practical implications of these two possible exemptions are enormously different. The first is not particularly controversial, even though household wastes may include modest amounts of hazardous materials. Because the resource recovery facility incinerates the municipal solid waste that it receives, the human health and environmental risks associated with exempting its mere receipt from Subtitle C are relatively confined both geographically and temporally. The financial savings to the resource recovery facility, however, may be substantial.

By contrast, the human health and environmental risks associated with the second kind of exemption, proposed by petitioner, are far greater in their potential magnitude. Those risks do not end at the resource recovery facility. That is instead where they begin. Under petitioner's reading, the operator of the facility is permitted to treat, store, and arrange for the transport and disposal of a hazardous waste throughout the nation pretending as if it does not contain the hazardous constituents that the waste in fact contains.

We do not question petitioner's claim (Pet. 15-17) that Congress intended to promote resource recovery facilities. And we certainly agree with petitioner's characterization of the waste management issues faced by this country as a "crisis." (Pet. 15). But, as the appellate court concluded (Pet. App. 20a), it would seem "unlikely," if not entirely "absurd," to suppose "that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive

amounts of hazardous waste in the form of ash into ordinary landfills."

It is therefore not surprising that plain meaning of the statutory language of RCRA Section 3001(i) does not support petitioner's proffered construction. Section 3001(i) expressly endorses only the first, relatively confined exemption relating to the receipt of household wastes. It exempts the resource recovery facility from Subtitle C in its receipt and burning of wastes, by providing that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing or, otherwise managing hazardous waste for the purposes of regulation under this subchapter." Omitted from the statutory language is any reference to exempting the facility from Subtitle C requirements applicable to the "generation" of a new hazardous waste in the event that the ash produced contains high levels of hazardous constituents.

Contrary to petitioner's claim, moreover, the reference in Section 3001(i) to "otherwise managing" cannot be reasonably read as embracing "generation." In RCRA, Congress carefully and precisely defined the terms "management" and "generation" in a manner that provides, as the court of appeals explained, for "no overlap whatsoever" (Pet. App. 19a).<sup>9</sup> No doubt Congress did so

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<sup>9</sup> RCRA defines the term "hazardous waste generation" as meaning "the act or process of producing hazardous waste." 42 U.S.C. 6903(6). "Hazardous waste management" is defined to mean "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. 6903(7).



to avoid the very absurdity that petitioner nonetheless insists was the legislature's intent.<sup>10</sup>

5. Finally, petitioner's reliance (Pet. 14-15) on both the EPA's construction of Section 3001(i) and the legislative history is misplaced. Neither defeats the plain, unambiguous meaning of the statutory language.

a. EPA has addressed the meaning of Section 3001(i) only once since its enactment in the kind of official manner that this Court accords deference. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); cf. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). In July 1985, soon after congressional passage of Section 3001(i), EPA concluded that it did "not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of a hazardous waste." 50 Fed. Reg. 28726 (July 15, 1985). That was the agency's authoritative view of the new statutory requirements, formulated contemporaneously to the law's passage, based on the statute's language, "legislative history and EPA's views of Congressional purposes for the new requirements." *Id.* at 28703.

To be sure, an Administrator of EPA has since advanced the opposite view. Last September, then-EPA

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<sup>10</sup> Petitioner mistakenly assumes that because the *management* of one kind of hazardous waste may result in the *generation* of another kind of hazardous waste that a statutory exemption applicable to the former activity must extend to the latter as well. The short answer is that such an assumption is improper where the two activities trigger distinct statutory requirements directed to different kinds of risks. Notions of proximate cause are no substitute in these circumstances for clear statutory definitions.

Administrator Reilly sent a memorandum to all regional EPA offices in which he announced the agency's decision "to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities \* \* \* as exempt from regulation under RCRA Subtitle C." Pet. App. 41a. Such subsequent agency shifts in view, however, are not "entitled to the deference normally accorded an agency's interpretation of the statute it administers." See Pet. App. 2a; *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"). But, in any event, where, as in this case, "the plain language of the statute is dispositive[,] \* \* \* [t]he public policy arguments [Administrator] Reilly discusses in the memorandum cannot override the mandate of the statute." Pet. App. 3a. See, e.g., *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2770 (1990).<sup>11</sup>

b. The legislative history is likewise unavailing to petitioner. Congress was aware, prior to passing Section 3001(i), that EPA had previously created an administrative exemption from Subtitle C for household wastes that purported to extend to the "residues remaining after \* \* \* incineration." 45 Fed. Reg. 33120 (1980). But, as

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<sup>11</sup> Apart from public policy arguments better directed to Congress, EPA's principal support for its new view is Congress's use of the term "disposing" in Section 3001(i). Because, EPA claims, the "ash ordinarily is the only waste 'disposed of' by a municipal resource recovery facility," Congress arguably intended that [incinerator] ash not be regarded as a hazardous waste." Contrary to EPA's assertion, however, there are substantial quantities of other wastes routinely disposed of by resource recovery facilities, including nonprocessible waste and "bypass waste," which is waste received in excess of capacity or during shutdown for maintenance or repairs.

explained by the court of appeals below, that is the very reason why Congress cannot be deemed to have embraced that same view:

Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word "generation" was not used in the final product. \* \* \* The actual words of the statute -- the end product of the rough-and-tumble of the political process -- are the definitive statement of congressional intent.

Congress, in short, rejected EPA's 1980 approach in its enactment of Section 3001(i) in 1984.<sup>12</sup>

Finally, Congress has since declined to amend RCRA to allow hazardous municipal incinerator ash to be regulated under the less demanding requirements of

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<sup>12</sup> The court of appeals also well explained why petitioner's reliance on a legislative report's addition of the term "generation" to those activities exempted from Subtitle C is unpersuasive: "Why should we, then, rely upon a single word in a committee report that did not result in legislation. Simply put, we shouldn't." Pet. App. 18a. Of course, we may never know precisely why those committee staffers who drafted the report were apparently unable to muster the support necessary to include "generation" in the statute itself. But where, as in this case, that addition portends such a significant expansion in the scope of Section 3001(i)'s reach, the resulting distinction between statute and report must be dispositive. Significantly, Congress has shown itself capable in the RCRA context of an exemption that, unlike Section 3001(i), expressly extends to the activity of generation. See 42 U.S.C. 6921 note (emphasis added) ("owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating* transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of [Subtitle C]").

Subtitle D.<sup>13</sup> Neither petitioner nor EPA should be allowed to circumvent Congress by unilaterally ignoring the plain meaning of the statutory language Congress enacted.

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<sup>13</sup> Significantly, Congress has repeatedly declined to pass legislation that would permit the disposal of municipal incinerator ash in Subtitle D landfills, even when, unlike the scheme proposed by petitioner and EPA, such permission would be conditioned upon the establishment of a distinct, more exacting regulatory framework applicable under Subtitle D to that specific waste. See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988); S. Rep. No. 102d Cong., 2d Sess. 56-60 (1992).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

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CITY OF CHICAGO, *et al.*,  
*Petitioners,*  
v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES  
AS *AMICUS CURIAE* IN SUPPORT  
OF THE PETITION FOR CERTIORARI

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### **QUESTION PRESENTED**

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation ash generated by the burning of municipal solid waste at such a facility.

## PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc. and Citizens for a Better Environment.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES  
AS *AMICUS CURIAE* IN SUPPORT  
OF THE PETITION FOR CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The National League of Cities ("NLC") is a not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Almost 15,000 municipalities are members of and participate in the activities of the NLC. The members of the NLC have a compelling interest in the legal issues pertaining to the incineration of municipal solid waste ("MSW") and the interpretation of the Clarification of Household Waste Exclusion found in Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).<sup>1</sup>

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<sup>1</sup> The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2.



The Court has recognized in the past that sanitation is a traditional function of local government and that local government bears the financial burden of this responsibility.<sup>2</sup> Cities and counties around the country, faced with diminishing MSW landfill capacity, increasing landfill tipping fees and great difficulties in siting new landfills, have invested heavily in resource recovery and combustion systems to manage MSW. Thus, 176 MSW combustors, owned both by local governments and private companies, now handle approximately 17% of the MSW generated in the United States. Because each of these facilities, including those privately owned, serves the MSW management needs of local governments, and because these facilities represent tremendous capital investments by local governments, the NLC and its members have a great financial stake in the outcome of this litigation. In addition to its financial interest in the issues presented in this case, the NLC has an interest in protecting municipal decision-making on local waste management issues. Because the Seventh Circuit's decision below will impose substantial additional costs on jurisdictions which operate resource recovery facilities, in many situations making further use of such facilities economically infeasible, local autonomy over MSW management is imperilled.

#### SUMMARY OF ARGUMENT

Below, the Seventh Circuit concluded that the exemption from the hazardous waste regulatory regime which Congress extended to resource recovery facilities burning MSW under Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), *see App., infra*, did not include the ash

<sup>2</sup> See *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (sanitation is "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services"); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

produced from burning MSW. The Seventh Circuit reaffirmed its initial ruling after this Court vacated that decision and remanded this case for reconsideration in light of an intervening policy memorandum by the Environmental Protection Agency ("EPA") in direct conflict with the appellate court's first holding.<sup>3</sup> The Seventh Circuit's latest decision is inconsistent with the language of Section 3001(i) and its legislative history and contrary to the reasonable interpretation offered by the federal agency charged with implementing the statute. Moreover, the consequences of the decision will defeat the very purpose for which Congress adopted the exemption—the encouragement of resource recovery.

Starting with the enactment of RCRA in 1976, and through two sets of amendments in 1980 and 1984, Congress sought to keep the management of MSW separate and apart from the regulatory regime relating to hazardous waste. Congress also sought to encourage local governments to burn MSW at resource recovery facilities to promote the generation of energy and to save scarce landfill space. To that end, Congress in 1984 adopted Section 3001(i), which expressly exempts all operations of MSW resource recovery facilities from RCRA's hazardous waste regulatory program.

If the Seventh Circuit's decision is not reversed, there will be a substantial disincentive for local governments to use resource recovery facilities to handle their MSW. From an economic standpoint, it is simply cheaper for many local governments to dispose of untreated MSW in a sanitary landfill than to burn the same material in a resource recovery facility and dispose of the ash in a hazardous waste landfill. If the Seventh Circuit's decision stands, local governments will be obliged by economic considerations to choose landfilling of untreated MSW over the use of resource recovery facilities, very few new

<sup>3</sup> EPA's memorandum is reproduced in the Petition for Certiorari at App. 41a.

resource recovery facilities will be built, and the limited space available for landfilling will be more quickly exhausted. Thus, the Seventh Circuit's interpretation of Section 3001(i) defeats the statute's overriding purpose.

Currently, there is a conflict between the Seventh Circuit's decision in this case and the decision of the Second Circuit in *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991), which held that the ash from a resource recovery facility is covered by the exemption in Section 3001(i). Moreover the rule of the Seventh Circuit is directly contrary to the official position of the EPA, the agency charged with administering RCRA. Because of the conflict, local governments outside of the Second and Seventh Circuits are faced with uncertainty about the legal requirements which relate to their handling of MSW ash. The uncertainty interferes with their ability to formulate plans for handling MSW in a lawful, but cost effective manner, discourages investments in new resource recovery facilities, and exposes local governments to lawsuits.

#### REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

##### I. THE SEVENTH CIRCUIT'S HOLDING WILL EXACERBATE THE CURRENT SHORTAGE OF LANDFILL SPACE, MAKE UNCERTAIN THE ECONOMIC VIABILITY OF RESOURCE RECOVERY FACILITIES, AND IMPOSE SIGNIFICANT COSTS ON LOCAL GOVERNMENTS

###### A. Resource Recovery Is An Important Aspect of MSW Management

This country faces a significant landfill crisis. While there were approximately 10,000 operating MSW landfills in 1970, only approximately 6,500 remained in operation

by 1988.<sup>4</sup> Many of these will be forced to close as a consequence of regulations promulgated by the Environmental Protection Agency ("EPA") in 1991.<sup>5</sup> As rapidly as landfill capacity has decreased, tipping fees at remaining MSW landfills have increased. Between 1988 and 1990 average tipping fees increased 17% nationally.<sup>6</sup> Moreover, the landfill crisis is compounded by severe regional capacity shortages, prompting many cities and counties to ship MSW to distant jurisdictions or across state lines and thereby adding significant transportation costs as well as disposal surcharges. For instance, a 1989 study reported that 11 New Jersey counties shipped their MSW out of state and that over half the state's refuse was sent to other regions of the country.<sup>7</sup>

Incineration has played a significant role in MSW disposal. In 1938, approximately 600 to 700 cities and towns burned their garbage and rubbish.<sup>8</sup> However, use of incineration waned as landfilling became more economical, and by 1974 only 160 incinerators and resource recovery facilities were in operation.<sup>9</sup> Today, resource recovery facilities and incinerators have again become a vital part of the MSW management system. They are increasingly important and popular due to the shortage

<sup>4</sup> 56 Fed. Reg. 50,978, 50,988 (Oct. 9, 1991); U.S. Environmental Protection Agency, EPA/530-SW-88-011A, *Report to Congress, Solid Waste Disposal in the United States*, Executive Summary at 1 (Oct. 1988).

<sup>5</sup> See 56 Fed. Reg. at 50,992.

<sup>6</sup> National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991). In the midwest and the mid-Atlantic regions of the country, fees increased by 31% and 20%, respectively.

<sup>7</sup> National Solid Wastes Management Association, *Landfill Capacity in the Year 2000*, at 5 (1989).

<sup>8</sup> Martin V. Melosi, *Garbage in the Cities* 217 (1981).

<sup>9</sup> *Id.*



and expense of landfill space. Incineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%.<sup>10</sup> Jurisdictions which burn portions of their MSW streams and then landfill the remaining ash reduce landfill tipping fees and transportation costs significantly. In 1991, 176 resource recovery facilities and incinerators burned more than 31 million tons of MSW, or 17% of the nation's total MSW stream.<sup>11</sup> If the 57 projects currently in planning and construction stages are completed, capacity will be increased to 53 million tons per year, or 24% of the estimated total volume of MSW that will be generated in the year 2000.<sup>12</sup>

In addition to saving landfill space, resource recovery facilities provide substantial other environmental and economic benefits. One ton of MSW burned in a resource recovery plant provides enough energy to light one thousand 100-watt light bulbs for one hour, power 500 hair dryers for one hour, or furnish electricity to an ordinary apartment for one month.<sup>13</sup> A portion of the energy generated by resource recovery facilities is used to operate the plants themselves, making the facilities self-sufficient, and the remainder is sold and the proceeds applied to the facility's operating expenses, further reducing the cost of MSW disposal to local government.

#### **B. Classifying MSW Ash as a Subtitle C Waste Will Create a Disincentive to Resource Recovery**

If MSW ash is reclassified as a hazardous waste, resource recovery facility operators will be required to dis-

<sup>10</sup> Homer A. Neal & J.R. Schubel, *Solid Waste Management and the Environment, the Mounting Garbage and Trash Crisis* 117 (1987).

<sup>11</sup> Jonathan V.L. Kiser, *Municipal Waste Combustion in the United States: An Overview*, *Waste Age*, Nov. 1991, at 27.

<sup>12</sup> *Id.*

<sup>13</sup> Neal & Schubel, *supra* note 10, at 108.

pose of that ash only at landfills which have obtained applicable state or federal treatment, storage and disposal permits under the strict requirements of Subtitle C of RCRA, 42 U.S.C. §§ 6924, 6925. As a consequence of the stricter environmental control requirements and the added risk of liability inherent in handling hazardous wastes, the cost of disposing of MSW ash in a hazardous waste landfill will be substantially greater than the cost of putting the ash in MSW landfills or in ash monofills. EPA estimates that, on a national average, the cost of disposing MSW ash in a Subtitle C landfill is approximately ten times as great as doing so in a Subtitle D landfill. See EPA Memorandum, *Petition for Certiorari* at App. 49a. The prohibitive cost of using Subtitle C landfills for MSW ash disposal is illustrated by the situation of Hennepin County, Minnesota. Hennepin County estimates its cost to dispose of MSW ash as a hazardous waste to be \$150 to \$200 per ton. This is three to four times the \$50 per ton which the county pays for ash disposal in a MSW landfill or monofill. Moreover, the cost is approximately six to seven times the national average for tipping fees at MSW landfills, which is \$26.56 per ton.<sup>14</sup> Furthermore, if all the MSW ash currently produced is diverted to hazardous waste landfills, hazardous waste landfill charges will likely increase significantly due to the added demand for space. Thus, the nation's limited hazardous waste landfill capacity would be taxed substantially and shortages would result.

By increasing the cost of ash disposal so dramatically, the Seventh Circuit's ruling below will create a significant economic disincentive to resource recovery. For instance, the City of Akron, Ohio, estimates the following: the cost of landfilling one ton of MSW is \$50; the cost of incinerating one ton of MSW and landfilling the ash in a MSW landfill is \$57; and the cost of incinerating one

<sup>14</sup> National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991).



ton of MSW and disposing of the ash in a hazardous waste landfill is \$92. Thus, for Akron, it would cost almost twice as much to burn a ton of MSW and take the residue to a hazardous waste landfill than to simply dispose of the untreated MSW in a sanitary landfill. Similarly, Montgomery County, Ohio, estimates that incinerating MSW and disposing of the ash as a hazardous waste would be approximately three times as costly as disposing uncombusted MSW in a MSW landfill in the first place.

Likewise, New York City, which incinerates over one million tons of MSW annually, estimates that its cost per ton would increase from approximately \$100 to over \$300 if the ash is designated as hazardous. This would increase New York's MSW disposal costs by over \$200 million per year. By way of comparison, the cost of diverting the MSW waste stream directly to a MSW landfill without any incineration is only \$30 per ton.<sup>15</sup> For Marion County, Oregon, landfilling MSW ash as a hazardous waste would almost double the cost of MSW disposal, raising it from the current cost of \$46.95 per ton to \$80.10 per ton. This can be compared with costs of \$36 per ton to send MSW directly to a landfill without incinerating it.

As the examples above show, requiring that MSW ash be treated as a hazardous waste will make the incineration process economically infeasible in many communities and may result in disposal of all the MSW generated by these communities in sanitary landfills. Consequently, MSW landfill capacity will begin to diminish at an even faster rate and tipping fees will increase accordingly. Thus, pure economics will force many cities and coun-

<sup>15</sup> This figure, however, is far below market rates because New York owns and operates its own landfill. Furthermore, the \$30 per ton figure does not include the cost of new landfill construction to compensate for lost capacity.

ties to choose landfilling of MSW over resource recovery if the ash residue must be handled as a hazardous waste.

As a result of the economic disincentives created by the Seventh Circuit's decision, resource recovery will cease to be a viable option for many communities. Moreover, facilities in the planning or construction stage may be canceled and the future viability of existing facilities will be jeopardized. The 57 plants currently in the planning or construction stages represent enormous development costs<sup>16</sup> to both local governments and private owners throughout the country who have relied on the RCRA's statutory goal of encouraging resource recovery and the explicit exemption of MSW resource recovery facilities from Subtitle C regulation provided by Congress in Section 3001(i).<sup>17</sup> Importantly, the Seventh Circuit's decision also results in geographical inequities by making MSW management far more expensive for municipalities in Illinois, Indiana, and Wisconsin than for local governments located in other circuits. To resolve this uncertainty and inequity, the Court should grant the petition for certiorari to determine a national rule which

<sup>16</sup> In 1985, the cost of construction of a resource recovery facility capable of processing 1000 tons of MSW per day was \$80 million. Neal & Schubel, *supra* note 10, at 117.

<sup>17</sup> The jurisdictions with publicly owned resource recovery facilities in the advance planning or construction stages include: Lisbon, Connecticut; Delaware Solid Waste Authority plant, near Millsburg, Delaware; Lee County, Florida; Mid-Maine Waste AC, Auburn, Maine; Montgomery County, Maryland; Oakland County, Michigan; Dakota County, Minnesota; St. Louis, Missouri; Mercer County, New Jersey; Monmouth County, New Jersey; Morris County, New Jersey; Union County, New Jersey; Mecklenburg County, North Carolina; Montgomery County, Pennsylvania; Kingston, Rhode Island; Johnston, Rhode Island; and Nashville, Tennessee. *The 1991 Municipal Waste Combustion Guide*, Waste Age, Nov. 1991, at 27. Numerous other plants, planned and financed by private companies, will serve other local governments, which will pay tipping fees for MSW disposal at these facilities.

local governments can rely upon in making MSW planning decisions.

**C. Requiring Treatment of MSW Ash as a Hazardous Waste Will Place Unnecessary Financial Burdens on Local Governments**

The financial burden of providing sanitation and solid waste disposal services has been increasing substantially for local governments, as has the cost of providing other essential services. At the same time, the federal government has drastically decreased its role in providing financial support to local governments. For example, local governments received approximately 9% of their revenues from the federal government in 1980, but only 3.6% in 1990.<sup>18</sup>

A study conducted by the National League of Cities in 1991 illustrates the financial plight of the cities. Almost 61% of the cities surveyed reported that 1991 general fund expenditures were expected to exceed revenues, and over 26% said that expenditures would exceed revenues by more than 5%.<sup>19</sup> The bankruptcy of the City of Bridgeport, Connecticut, is but one example of the desperate financial circumstances facing many cities.<sup>20</sup>

Further, 66.3% of the responding cities reported that the cost of solid waste disposal was one factor beyond

<sup>18</sup> U.S. Department of Commerce, *Statistical Abstract of the United States 1992*, at 294.

<sup>19</sup> National League of Cities, *City Fiscal Conditions in 1991*, at iii (1991).

<sup>20</sup> See George Judson, *Anguished Plea from Bridgeport for Fiscal Relief*, N.Y. Times, June 8, 1991, at 1. It is interesting to note that Bridgeport invested substantially in a resource recovery facility which went on line in 1988.

their control contributing to fiscal difficulties.<sup>21</sup> Over 10% of cities reported that landfill, refuse, solid waste and recycling expenses comprise the single factor that most adversely affected city expenditures.<sup>22</sup>

The Seventh Circuit's ruling will significantly increase MSW management costs by compelling local governments to pay for disposal of MSW ash in expensive hazardous waste landfills or to pay, either directly or indirectly through higher tipping fees, for increased MSW landfill space. If obligated to spend more for solid waste disposal, local governments will be even more disadvantaged in furnishing other needed services to their constituents. Like solid waste disposal costs, necessary service costs have been rising faster than have revenues. For example, while city government revenues rose by 9.5% between 1988 and 1990, solid waste management costs rose by 12.5%.<sup>23</sup> Over the same period, health costs rose by 15.3%, police protection costs by 11.1%, corrections costs by 26.9%, and judicial and legal administration costs by 17.3%.<sup>24</sup>

**II. THE SEVENTH CIRCUIT'S DECISION FRUSTRATES CONGRESS' GOAL OF ENCOURAGING RESOURCE RECOVERY**

Congress consistently has sought to promote two objectives relating to the handling of MSW: (1) keeping the management of MSW separate and apart from RCRA's hazardous waste management regime, and (2) facilitating resource recovery as an option for managing MSW in order to save scarce landfill space and promote

<sup>21</sup> National League of Cities, *supra* note 19, at 31. Solid waste disposal costs ranked higher than changes in the amount of state aid to cities (59.2%) and employee pension costs (58.5%).

<sup>22</sup> *Id.* at 7.

<sup>23</sup> U.S. Department of Commerce, *City Government Finances 1989-90*, at 1 (summary).

<sup>24</sup> *Id.*

energy recovery. As described below, these two objectives have been articulated by Congress in its enactment of RCRA in 1976, as well as in subsequent amendments to RCRA in 1980 and 1984.

**A. Regulation of MSW Resource Recovery Is Separate from the Regulation of Hazardous Wastes Under Subtitle C of RCRA**

In enacting RCRA in 1976,<sup>25</sup> Congress unambiguously separated the handling of MSW from the scheme for managing hazardous wastes established under Subtitle C of RCRA. *See* S. Rep. No. 988, 94th Cong., 2d Sess. 15-16 (1976) (stating that the hazardous waste permit program is "not a general regulatory program of municipal or private sanitary landfill operations . . . [and] is not to be used . . . to extend control over general municipal wastes") (emphasis added).

Expressing concern over the increasing scarcity of land available to metropolitan areas for landfilling of MSW, Congress further concluded that resource recovery facilities should be promoted as an alternative to landfilling and as an independent source of energy. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. *See also* Section 1002(b)(8) and (d) of RCRA, 42 U.S.C. § 6901(b)(8) and (d). To facilitate the development of MSW resource recovery, Congress authorized technical as well as research and development aid to localities developing resource recovery facilities under Subtitles B and D of RCRA. *See* Sections 2003 and 4008 of RCRA, 42 U.S.C. §§ 6913, 6948. Also, Congress authorized EPA to promulgate rules and guidelines to assist states in implementing resource recovery plans, and to specifically consider appropriate types of resource recovery facilities for a variety of state and

<sup>25</sup> Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k).

municipal situations. *See* Section 4002(c)(10) of RCRA, 42 U.S.C. § 6942(c)(10).

Congress' intention to promote the incineration of MSW to produce energy as a primary means of resource recovery is reflected throughout the legislative history of RCRA's enactment. For example, House Report 1491 explains that Section 4003 of RCRA, 42 U.S.C. § 6943, allows state and local governments the flexibility needed to develop alternative disposal systems by "requir[ing] that the discarded materials be utilized by a resource recovery facility for the recovery of energy . . . or that such discarded materials be disposed of . . . by [an] environmentally sound method of disposal, *including incineration* that does not conflict with the Clean Air Act." H.R. Rep. No. 1491, at 78-79 (emphasis added).<sup>26</sup>

Four years after the passage of RCRA, Congress reaffirmed its objective of promoting the development of resource recovery facilities by enacting Section 32 of the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (hereinafter "1980 RCRA Amendments"). Section 32 of the 1980 RCRA Amendments, codified at various parts of Subtitle D of RCRA, amended the statute in order to improve and augment federal programs for energy and resource recovery assistance to states and municipalities. Section 32 authorized the EPA to provide grants to states and municipalities in order to facilitate waste-to-energy feasibility and developmental planning, and to provide technical assistance

<sup>26</sup> *See also* H.R. Rep. No. 1491, at 88-89, *reprinted in* 1976 U.S.C.C.A.N. 6324 (detailing the composition of the MSW stream, and comparing the energy yields from incineration of MSW and coal in terms of the British Thermal Unit value per pound each contain, as well as their respective ash content equivalents): 122 Cong. Rec. H1147, H1153 (Sept. 27, 1976) (statement of Rep. Myers) (RCRA represents a "major congressional commitment" to recapturing the discarding of "millions of tons of paper, valuable metals, glass, and other waste materials which could be reused or burned for their energy value.") (emphasis added).



in order to remove impediments to the development of energy recovery.

Thus, the 1976 and 1980 statutes demonstrate Congress' intent to regulate MSW separately from hazardous wastes. These statutes and their legislative history also show that a primary objective of Congress was to promote the development of resource recovery facilities, including facilities which recovered energy from the *incineration* of MSW.

**B. The Household Waste Exclusion Expressly Exempts All Aspects of MSW Management from RCRA's Hazardous Waste Regulatory Program**

Consistent with the resource recovery policies and MSW regulatory scheme embodied by Congress in RCRA, EPA promulgated the household waste exclusion rule in 1980. See 45 Fed. Reg. 33,084, 33,120 (May 19, 1980), and see App., *infra*. Responding in the regulation's preamble to comments suggesting that portions of the household waste stream should be regulated as hazardous wastes because they might include solvents, insecticides, and paints purchased at grocery stores, EPA pointed to Congress' intent to exclude the entire household waste stream from regulation as a hazardous waste. Although EPA acknowledged that hazardous constituents may be included in household wastes, the agency nonetheless concluded that Congress' intent was best served by excluding the entire waste stream from Subtitle C regulations:

The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. *Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.*

45 Fed. Reg. at 33,099 (emphasis added). Hence, the entire category of household waste, including ash residue

remaining after treatment, was explicitly exempted from regulation as a hazardous waste. The rationale for this exemption was not based on the *content* of household waste, but rather on the express congressional policy of exempting *the entire household waste stream* from the hazardous waste regulations regardless of whether it could be classified as a hazardous waste on account of the characteristics of its constituents. See *id.* at 33,097.

EPA knew when it promulgated the regulation that a small amount of hazardous waste would be included in the household waste stream. However, neither Congress nor EPA intended to omit any particular phase in the management of the MSW waste stream from the household waste exclusion. In particular, by describing incinerator ash as the residue left after "treatment" of the waste stream, and by including the ash within the discussion of the waste stream's overall management, EPA unambiguously exempted the ash from regulation as a hazardous waste. Thus, EPA excluded the *entire* household waste stream "in all phases of its management" from RCRA's hazardous waste regulatory regime, regardless of whether the treatment residue-ash might meet the legal definition of "hazardous waste."

Discussing the hazardous waste regulatory scheme in the preamble to the regulation, EPA acknowledged that the system was imperfect.

This system may not work perfectly for every waste however. *It may overregulate in some instances and underregulate in others.* This is an unavoidable consequence of attempting to develop a national hazardous waste management program which has to regulate thousands of wastes . . . .

*Id.*, at 33,088-89 (emphasis added). Viewed in this context, the fact that MSW ash was not regulated as a hazardous waste is not surprising. EPA, in accordance with the policy choice made by Congress, simply struck a

balance in favor of underregulation in order to promote the important social values of providing local governments with flexibility in handling their MSW and of encouraging resource recovery.

When Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (hereinafter "1984 RCRA Amendments"), it took the unusual step of expressly adopting and clarifying EPA's interpretation of legislative intent by enacting the "Clarification of Household Waste Exclusion."<sup>27</sup> The provision codified in the statute the household waste exclusion as promulgated by EPA. It also clarified that the exclusion removed the entire household waste stream from the Subtitle C hazardous waste regulatory regime, and that it applied to resource recovery facilities which burned and derived energy from MSW.

The intent behind the clarification is stated in the Senate report accompanying the Senate amendments to the original House bill, and agreed to by the conference committee.<sup>28</sup> Recognizing that it was important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation, the Senate report indicated that new Section 3001(i) clarified Congress' original intent to include within the household waste exclusion all the activities of a resource recovery facility which recovered energy from the mass burning of household waste *and* non-hazardous waste from other sources, as long as the facility took precautions against accepting hazardous waste from commercial sources.

All waste management activities of such a facility, including the generation, transportation, treatment,

<sup>27</sup> See Section 223 of the 1984 RCRA Amendments, 98 Stat. 3252 (codified as amended at § 3001(i) of RCRA, 42 U.S.C. § 6921(i)).

<sup>28</sup> See H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 106 (1984), reprinted in 1984 U.S.C.A.N. 5576, 5677.

storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) are met . . . . If such [limitations] are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

This unambiguous statement by the Senate that all MSW waste management activities by a resource recovery facility are covered by the exclusion confirms that EPA correctly reflected Congress' intent when it first promulgated the household waste exclusion rule. This Court has ruled that an administrative agency's interpretation of congressional intent is entitled to great weight when Congress is aware of the agency's interpretation but fails to revise or repeal the interpretation in subsequent legislation. See *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Zuber v. Allen*, 396 U.S. 168, 192-3 (1964); *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U.S. 269, 273 (1933). Therefore, EPA's 1980 household waste exclusion rule, which expressly covered treatment residue, was confirmed by the 1984 RCRA Amendments.<sup>29</sup>

<sup>29</sup> The Seventh Circuit below, in both of its opinions, concluded that EPA's interpretation of the household waste exclusion was entitled to no judicial deference due to the Agency's sometimes conflicting pronouncements on the exclusion's meaning. See 985 F.2d at 304; 948 F.2d at 350.

Judge Ripple, dissenting from the decision on remand, noted his disagreement with the panel's refusal to extend any deference to EPA's September 18, 1992 policy memorandum, which stated the Agency's position that Section 3001(i) of RCRA exempts MSW incinerator ash from regulation as a hazardous waste. As Judge Ripple cogently explained, EPA's recent action to clarify the house-



By focusing on whether "management" and "generation" are coextensive terms, the Seventh Circuit missed what is really at issue in interpreting the household waste exclusion: the congressional intent that this particular waste stream in all phases of its management, which includes treatment by incineration and disposal of the ash residue resulting from such treatment, be excluded from the regulatory scheme under Subtitle C of RCRA. Instead of placing the statute within the context of the underlying regulatory and statutory policies, the Seventh Circuit seized upon the absence of the word "generation" from the language of Section 3001(i) to support an interpretation which contradicts, and defeats the purpose of, the statute itself.

hold waste exclusion was a responsible attempt to resolve a major environmental policy question in a situation where two courts of appeals had reached diametrically opposed decisions on a question of statutory interpretation. 985 F.2d at 304-05. Despite the fact that EPA offered different interpretations of the statute in the past, the Agency's current position, which is both well-reasoned and reasonable given the language of the statute, is entitled to judicial deference under this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, *Chevron* itself was a case where EPA's interpretation of the statute in question had changed over time; nonetheless, this Court decided that it was appropriate to give deference to EPA's final decision as to the correct interpretation of the statute. See 467 U.S. at 857-58.

The Court's rationale in *Chevron* could not be more apropos to this case:

[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.

467 U.S. at 865 (citations omitted).

Accordingly, the Court should grant certiorari to correct the Seventh Circuit's failure to extend any deference whatsoever to EPA's policy statement as it was required to do under *Chevron*.

The Seventh Circuit's focus on the absence of the word "generation" in Section 3001(i) is misplaced. First, "generation" is expressly included within the scope of the exemption in the Senate report's discussion of Section 3001(i) which was agreed to by the conference committee. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Second, the absence of the word "generation" in Section 3001(i) is not even relevant to the question of whether the exemption extends to MSW ash.<sup>30</sup> In producing ash, a resource recovery facility is not "generating" a new waste. Rather, it is *treating* pre-existing municipal solid waste to produce what EPA properly described as a "treatment residue" in the preamble to the 1980 household waste exclusion rule, and is "disposing" of that residue in a sanitary landfill. As EPA noted in its policy memorandum,

when a resource recovery facility receives or stores a non-hazardous solid waste . . . the burning of such waste generally is regarded as a type of treatment under RCRA.

EPA Memorandum, Petition for Certiorari at App. 43a. Because Section 3001(i) expressly includes "treatment" and "disposal" within the scope of the exemption, the handling of the ash as a treatment residue also falls within the exemption.<sup>31</sup>

The Seventh Circuit's interpretation strips the statute of meaning by making the exemption no longer useful

<sup>30</sup> Under section 1004(27) of RCRA, 42 U.S.C. § 6903(27), a material becomes a "solid waste" at the time it is first discarded. See *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). Therefore, a "solid waste" is generated whenever a person or business puts its garbage out for pickup by a waste hauler before the garbage arrives at the resource recovery facility.

<sup>31</sup> See Section 1004(34) of RCRA, 42 U.S.C. § 6903(34), which defines the term "treatment" when used in connection with a hazardous waste, to mean "any method, technique or process . . . designed to change the physical, chemical, or biological character or composition" of the waste.



for the purpose it was intended to promote. By creating an economic disincentive to resource recovery, the Court of Appeals' decision will in effect *discourage* the building of new resource recovery facilities which incinerate MSW as a means of energy recovery, and dissuade local governments from using existing facilities. The decision undermines Congress' intent in enacting the exclusion clarification, as well as Congress' underlying objectives with respect to the handling of MSW throughout the history of the RCRA legislation.

### CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the *amicus curiae* respectfully urges the Court to grant certiorari.

Respectfully submitted,

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April 30th, 1993

### APPENDIX

1. Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

#### CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION.

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources),

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

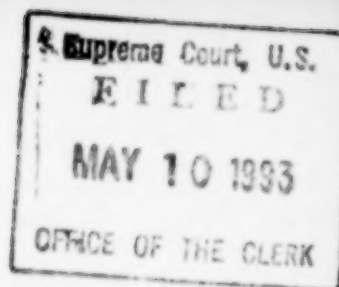
(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

2. As originally promulgated, 45 Fed. Reg. 33,084, 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1)), the Household Waste Exclusion stated:

(b) *Solid wastes which are not hazardous wastes.*  
The following solid wastes are not hazardous wastes:

2a

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-used. "Household waste" means any waste material (including garbage, trash, and sanitary wastes in septic tanks) derived from households—(including single and multiple residences, hotels and motels).



No. 92-1639

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1992

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THE CITY OF CHICAGO, et al.,  
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, et al.,  
Respondents.

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**Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit**

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**BRIEF OF THE CITY OF SPOKANE, WASHINGTON;  
SPOKANE COUNTY, WASHINGTON;  
SKAGIT COUNTY, WASHINGTON;  
CITY OF TACOMA, WASHINGTON; MARION COUNTY,  
OREGON; RECOMP OF WASHINGTON; AND REGIONAL  
DISPOSAL COMPANY AS *AMICI CURIAE* IN SUPPORT  
OF PETITIONERS**

---

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The City and County of Spokane, Washington; the City of Tacoma, Washington; Skagit County, Washington; Marion County, Oregon; Regional Disposal Company; and Recomp of Washington respectfully submit this brief as *amici curiae* in support of the petition of the City of Chicago for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.<sup>1</sup>

### INTERESTS OF *AMICI*

The United States faces a waste disposal crisis. In contrast to landfills, space for which is fast disappearing, incineration recovers energy from and reduces the volume of municipal trash. These benefits, among others, make resource recovery a key weapon in the war on waste. The decision of the Court of Appeals, however, threatens to foreclose resource recovery and to punish every private and public entity that accepted Congress's invitation to exploit its benefits.

For the City and County of Spokane, Washington, resource recovery was a response not only to a waste disposal crisis, but also to a drinking water crisis. The citizens of the City of Spokane and Spokane County (collectively "Spokane") are blessed with a priceless resource: the Spokane Valley-Rathdrum Prairie Aquifer. The aquifer is the federally designated sole source of drinking water for over 500,000 people. 43 Fed. Reg. 5566 (Feb. 9, 1978). Yet it is also a fragile resource, subject to pollution by landfills. Landfills above the aquifer have been a concern for many years.

Contamination of the aquifer from solid waste landfills was first noted in 1979 when the Spokane County Engineer's

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<sup>1</sup> The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

office issued its *Water Quality Management Plan to Preserve the Quality of the Spokane-Rathdrum Aquifer* under Section 208 of the Federal Water Pollution Control Act, 33 U.S.C. § 1288 (1988). The Water Quality Management Plan recommended that resource recovery, recycling, and innovative disposal methods be considered as alternatives to landfills. In 1984 Spokane's Northside Landfill was placed on the National Priorities List (NPL) of waste cleanup sites, commonly referred to as "Superfund sites." 49 Fed. Reg. 40,320 (October 15, 1984). Spokane's landfills at Mica, Greenacres and Colbert were also added to the NPL. 51 Fed. Reg. 21,054 (June 10, 1986).<sup>2</sup> The Mica, Greenacres and Colbert landfills are now closed, and all but a few acres of the Northside Landfill are closed as well.

In response to this dual crisis of landfill capacity and drinking water supply, Spokane began a regional public planning process. The first step in the planning process was to consider alternatives to solid waste landfills. In 1981 Spokane began analyzing resource recovery and recycling. Three years later it adopted the *1984 Spokane County Comprehensive Solid Waste Management Plan Update* ("1984 Plan"). The 1984 Plan includes specific elements for recycling, waste reduction and resource recovery; garbage landfills are only a last resort for Spokane. The Washington Department of Ecology ("Ecology") approved the 1984 Plan, and the Washington Supreme Court held it was consistent with the Washington Solid Waste Management Act ("SWMA"), Wash. Rev. Code ch. 70.95 (1989). *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990).

To mitigate the effects of existing landfills as rapidly as possible, Spokane aggressively implemented the recycling and resource recovery elements of the 1984 Plan. Recycling

<sup>2</sup> Sites are added to the NPL only if the Environmental Protection Agency finds that they present a significant risk to public health or the environment compared to other sites in the nation. See 42 U.S.C. § 9605(a)(8) (1988).

programs increased the recycling rate in Spokane County from 5% in 1984 to 31% in 1992.<sup>3</sup> To manage the rest of the waste stream, Spokane issued an environmental impact statement and selected a site for a waste-to-energy facility ("WTE") in 1986. In 1987 Spokane signed a vendor contract to build and operate the WTE, a power sales contract for the electricity that the WTE generates, and a lease for the WTE site. In 1989 Spokane issued \$103 million in bonds and accepted a \$60 million grant from Ecology to design and build the WTE and recycling programs. In 1990 Spokane signed a long-term contract for ash disposal away from Spokane's aquifer at *amicus* Regional Disposal Company's new state-of-the-art ash monofill in Klickitat County, Washington.

*Amici* Skagit County, Marion County and Tacoma all faced solid waste disposal challenges similar to Spokane's. They planned long-term, integrated strategies and opted for recycling and resource recovery as cost-effective and in the best interests of their local communities. Whatcom County, Washington, under the planning requirements of SWMA, elected to use private incineration and ash landfill facilities owned and operated by *amicus* Recomp of Washington ("Recomp") in Whatcom County. *Amicus* Regional Disposal owns and operates an ash landfill in Klickitat County, Washington, that serves Spokane and could become an ash disposal facility for any new or existing resource recovery facilities in the Pacific Northwest.

<sup>3</sup> Spokane's long-range goal is to recycle 50% by 1995, in accordance with the goal set by the Washington Legislature. Wash. Rev. Code § 70.95.010(9) (1992). See also *Spokane County Comprehensive Solid Waste Management Plan Update*, p. 82 (January 1992).



## SUMMARY OF ARGUMENT<sup>4</sup>

Congress provided a comprehensive national framework for waste management in the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 - 6992k ("RCRA"). RCRA establishes minimum federal requirements that are implemented at the state and local level. State and local government may supplement RCRA's minimum requirements with more stringent standards.

At the heart of RCRA is a distinction between wastes that are "hazardous" and wastes that are not. See 42 U.S.C. § 6921 (1988). "Hazardous" wastes are a small, distinct subset of "solid" wastes. Hazardous wastes are subject to very stringent minimum standards under Subtitle C of RCRA. See 42 U.S.C. §§ 6921 - 6939b (1988). Subtitle C standards detail all phases of hazardous waste management, from the type-size on 55-gallon drum labels to the design standards for large regional landfills. Solid wastes are subject to an equally comprehensive but less stringent set of minimum standards under Subtitle D of RCRA. See 42 U.S.C. §§ 6941 - 6949a (1988).

Congress's decision to regulate hazardous and solid wastes separately rests on the sound principle that hazardous wastes pose the greatest risk to public health and should be regulated more stringently than other wastes. Congress also recognized that applying Subtitle C standards broadly could discourage beneficial activities, and that effective implementation of Subtitle C requires focus on the relatively small number of

<sup>4</sup> *Amici curiae* agree with petitioners' arguments that the Court should grant review because the Second and Seventh Circuits have issued conflicting rulings, because the Seventh Circuit's decision contravenes RCRA's language and Congress's intent, and because the question presented calls for judicial resolution. The thrust of this brief is different: It calls attention to the uncertainty created in the Pacific Northwest by the Seventh Circuit's decision and shows how that decision undercuts fundamental statutory policies in RCRA.

industries that generate the largest amounts of hazardous waste. Thus, Congress authorized exclusions to its definition of hazardous waste and entrusted the states with the primary responsibility for regulating the remaining waste stream.

The Court of Appeals' decision in this case<sup>5</sup> ignores these key policies. The Seventh Circuit's interpretation of RCRA would subject local solid waste management to stringent Subtitle C standards. If adopted in the Ninth Circuit, the court's interpretation would require Pacific Northwest cities and counties implementing resource recovery and recycling programs to amend their waste management plans and to even consider abandoning existing public and private waste management facilities. Cities and counties would be required in the mid-1990s to start yet another decade-long effort to address the solid waste crisis, but with less time and even fewer options than were available in the mid-1980s.

The Court of Appeals' decision also threatens to disrupt existing contractual arrangements between the public and private sectors. Long-term contracts have been signed based on predictable, long-term operating costs. Hundreds of millions of dollars worth of municipal bonds have been issued and repayment terms negotiated based upon predictable, long-term ash disposal fees. An immediate and unexpected 600% increase in landfill costs could jeopardize the ability of government to repay these bonds. This in turn could ruin municipal bond ratings and jeopardize financing for roads, buildings, bridges,

<sup>5</sup> The Court of Appeals initially decided this case in 1991, *Environmental Def. Fund v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991). The Court then granted certiorari, vacated the decision and remanded to the Court of Appeals for reconsideration in light of the memorandum of the Administrator of the Environmental Protection Agency (Sept. 18, 1992) captioned *Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under RCRA Section 3001(i)*. 113 S. Ct. 486 (1992). Unpersuaded by the Administrator's memorandum, the Court of Appeals affirmed its previous decision on remand. 985 F.2d 303 (7th Cir. 1993).

sewers, waste water treatment plants, landfill closures, and public transit.

Such costs might be tolerable if they resulted in significant public benefit. Imposing Subtitle C standards on ash, however, will not provide any additional protection for the public. In Oregon and Washington, ash and other processed solid wastes are managed under specifically tailored standards that are at least as stringent as EPA's newest solid waste landfill standards.<sup>6</sup> In a landfill environment, ash is less troublesome than unprocessed garbage. Making ash management subject to Subtitle C will not protect the public or help solve the nation's solid waste crisis, but only impose Respondents' waste management agenda on state and local government.

### ARGUMENT

#### 1. *Ash Poses Less Risk to the Public Than Municipal Solid Waste.*

Congress provides different levels of regulation under RCRA, depending on the degree of risk to the public from improper management of different kinds of waste. Hazardous waste can "cause or significantly contribute to an increase in mortality or an increase in serious illness" and can "pose a substantial present or potential hazard to human health or the environment." 42 U.S.C. § 6903(5) (1988). Solid waste, on the other hand, is "any garbage, refuse, sludge . . . and any other discarded material," regardless of the threat posed to the public or environment. 42 U.S.C. § 6903(27) (1988).

Both municipal solid waste ("MSW")<sup>7</sup> and ash from its incineration have been tested to determine potential public health

<sup>6</sup> In October 1991 EPA substantially upgraded its Solid Waste Disposal Facility Criteria. 40 C.F.R. pts. 257 and 258 (1992).

concerns. Public agencies and private companies have extensively tested leachate<sup>8</sup> from ash and MSW for both research and compliance purposes.<sup>9</sup> The U.S. Environmental Protection Agency's "Toxic Characteristic Leaching Procedure" ("TCLP"), which is used to determine if a solid waste is "hazardous," mimics leachate generation in a landfill. See 40 C.F.R. § 261.24 (1992). TCLP tests on ash and ash landfill leachate confirm that, compared to MSW landfill leachate, leachate from ash is consistently less contaminated.<sup>10</sup>

As these tests demonstrate, ash stored in a landfill environment presents less risk of ground water pollution than MSW. It is undisputed that MSW is *not* regulated as a "hazardous" waste under Subtitle C of RCRA.<sup>11</sup> Congress

<sup>7</sup> "Municipal solid waste" refers to waste from households, businesses and institutions that is excluded from the definition of "hazardous" in RCRA and EPA regulations. See footnote 11, *infra*.

<sup>8</sup> "Leachate" refers to liquids such as water that pass through a waste material and collect contamination from the waste. Leachate from a landfill can migrate and pollute ground water unless collected and properly treated and disposed. A system of landfill liners and collection pipes serves this purpose. See, e.g., 40 C.F.R. Pt. 258 (1992), Wash. Admin. Code 173-304-460 (1990); and *Special Incinerator Ash Management Standards*, Wash. Admin. Code 173-306-440 (1990).

<sup>9</sup> EPA, *Characterization of Municipal Combustion Ash, Ash Extracts and Leachates* (March 1990) (EPA/530-SW-90-29A); NUS Corp., *Final Municipal Waste Combustion Ash and Leachate Characterization, Woodburn, Oregon* (1989); Ujihara, *Managing Ash From Municipal Waste Incineration* (Nov. 1989); Clapp, *Municipal Solid Waste Composition and the Behavior of Metals in Incinerator Ashes* (Feb. 1988); McGinley and Kmet, *Formation, Characterization, Treatment and Disposal of Leachate from MSW Landfills* (August 1987) (Wisconsin Department of Natural Resources).

<sup>10</sup> NUS Corp., *Characterization of Municipal Waste Combustion Ashes and Leachates from MSW Landfills, Monofills and Co-Disposal Sites* (1987) (EPA/530-SW-87-028F).



concluded that MSW can be safely regulated under Subtitle D as a solid waste. The Court of Appeals' decision imposing Subtitle C standards on ash management is perverse. Congress did not intend Subtitle C to apply to waste that poses less risk to public health than MSW.

2. *Applying Subtitle C Standards to Ash Discourages Beneficial Waste Management Options.*

The Court of Appeals' interpretation of RCRA threatens the viability of both of the key alternatives to MSW landfills: resource recovery and material separation. RCRA, in contrast, reflects a national policy that encourages resource recovery and recycling. Congress found:

[M]illions of tons of recoverable material which could be used are needlessly buried each year; . . . [and] methods are available to separate usable materials from solid waste.

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[S]olid waste represents a potential source of solid fuel, oil or gas that can be converted into

<sup>11</sup> Congress clearly intended that "general municipal wastes" not be regulated as hazardous. S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). See also 42 U.S.C. § 6941 (1988). "Household" waste, regardless of its content or quantity, has been excluded from Subtitle C since RCRA's inception. 43 Fed. Reg. 58969 (Dec. 18, 1978) (promulgating 40 C.F.R. § 261.4(b)(1)). In 1984 Congress provided a "clarification of household hazardous waste exclusion" in the section of RCRA that is the focus of this litigation; i.e., 42 U.S.C. § 6921(i) (1988) (herein "RCRA Section 3001(i)"). Small quantities of waste from businesses and institutions, regardless of content, have also been excluded from Subtitle C since RCRA's inception. 43 FR 58969 (Dec. 18, 1978); 40 C.F.R. § 261.5 (1992). Together, these exclusions allow local government to manage MSW outside the confines of Subtitle C.

energy; . . . [and] technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(c) and (d) (1988). See also *id.* § 6941a(1) - (3).

Imposing Subtitle C standards would dramatically impact existing resource recovery and ash disposal facilities. For example, Spokane transports ash to a privately owned off-site landfill and pays a "tipping fee" to *amicus* Regional Disposal Company, the landfill owner. The tipping fee is based in part on landfill operating costs, which are in turn influenced by the extent of landfill regulations. *Amici* Skagit County, Marion County and Tacoma dispose of ash at publicly owned landfills. These communities do not pay tipping fees, but instead directly finance the costs of operating ash landfills. *Amicus* Recomp owns and operates resource recovery and ash disposal facilities in Whatcom County, Washington, and charges a disposal fee based on the cost of operating both facilities. Typically, ash disposal costs represent 20 - 30% of the cost of operating a resource recovery facility.

The relative costs of operating Subtitle C and Subtitle D landfills are reflected in the tipping fees charged by these facilities. The tipping fee for off-site ash disposal in the Pacific Northwest is approximately \$35 - 40 per ton. The operating cost for on-site ash disposal in the Northwest is approximately \$25 - 30 per ton.<sup>12</sup> The cost of disposal at RCRA Subtitle C facilities in the Pacific Northwest, on the other hand, is approximately \$240-270 per ton.<sup>13</sup>

<sup>12</sup> The difference between the cost per ton for on-site and off-site ash disposal is primarily due to the cost of transportation.

<sup>13</sup> In the Pacific Northwest, existing Subtitle C landfills are located in Montana, Utah, Idaho and Oregon. The cost estimate for disposal at these facilities does not include the cost of transportation.



Thus, the Court of Appeals' decision would impose an immediate tipping fee increase on existing facilities of at least 600%.<sup>14</sup> Many resource recovery facilities would be forced to close. All of the existing ash landfills would be forced to close or bear the additional cost to upgrade to Subtitle C standards, if that were possible. Solid waste landfills would increase. This would further exacerbate an already short supply of landfill capacity and, in areas such as Spokane, accelerate the threat to drinking water from leaking solid waste landfills. This is hardly consistent with Congress's expressed policy to *encourage* energy recovery from solid waste and *minimize* solid waste landfills.

The Court of Appeals' decision could also adversely affect material separation (i.e., "recycling"). To justify its interpretation of RCRA, the Court of Appeals relied heavily upon the fact that incineration changes the physical and chemical nature of solid waste.<sup>15</sup>

[T]he "garbage" that emerges from the incineration process -- ash -- is fundamentally different in its chemical and physical composition from the . . . rubbish that goes in. It does not

<sup>14</sup> In 1987 EPA recognized the significant cost of disposing of ash as hazardous waste: "If the ash generated by a municipal waste combustion facility were to be managed as a hazardous waste, the cost of managing that ash would be expected to increase substantially." EPA, *Municipal Waste Combustion Study: Report to Congress*, p. 26 (June 1987) (EPA/530-SW-87-021). In 1992, EPA stated that the national average cost of Subtitle C disposal for ash is ten times the cost of disposal in a Subtitle D landfill. Memorandum of William K. Reilly, Administrator, Environmental Protection Agency (Sept. 18, 1992).

<sup>15</sup> There is no question that ash differs chemically and physically from solid waste. This is a necessary consequence of liberating the energy stored in garbage to generate electricity or steam. It is also one reason that the leachate from ash is *less* of a threat to ground water than the leachate from solid waste.

follow that the generation of . . . a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare households and municipalities from a complicated regulatory system if they inadvertently handled hazardous waste.

*Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 351 (7th Cir. 1991), *cert. granted, decision vacated and remanded*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303 (7th Cir. 1993). The Court of Appeals reasoned that household waste loses its exclusion from Subtitle C once the chemical and physical nature of the waste changes.

Like incineration, the removal of paints, solvents, oil, bottles, cans, batteries, plastic, and paper from solid waste necessarily changes the physical and chemical nature of that waste. Major new "materials recovery facilities" ("MRFs") are being built and operated across the country in an effort to recover valuable materials from the solid waste stream.<sup>16</sup> Other communities rely on "source separation," where the generator (i.e., household or business) separates usable materials from the solid waste stream.

Material separation saves money and protects the environment by reducing the amount of material that must be landfilled. Separated materials such as newspaper and aluminum cans replace "virgin" materials such as trees and aluminum ore. This eliminates secondary environmental impacts from harvesting or extracting virgin materials. In some cases material separation produces "refuse-derived fuel" ("RDF"). RDF is used as fuel at resource recovery facilities and even in existing

<sup>16</sup> *Amicus* Skagit County plans to operate a MRF adjacent to its waste-to-energy facility.

industrial boilers and furnaces in place of or as a supplement to coal or oil.<sup>17</sup>

Under the Court of Appeals' reasoning, all MSW loses the benefit of any Subtitle C exclusions if the "chemical and physical composition" of the waste changes. The court's rationale leaves no room to distinguish between a change in physical or chemical composition caused by thermal or mechanical processes. As a result, the Court of Appeals' interpretation of RCRA strips the household waste exclusion not only from resource recovery residue but also from material separation residue.

Without a Subtitle C exclusion, residues from any material separation process must be tested under RCRA Subtitle C and, depending on test results, stringently managed as "hazardous waste". Suddenly, the costs and regulatory complexity of managing the waste from MRF, RDF and other material separation programs, like ash from resource recovery facilities, become prohibitive. The Court of Appeals' interpretation of RCRA discourages material separation and resource recovery and is inconsistent with congressional policy.

### 3. *The Court of Appeals' Interpretation Destroys Local Planning Efforts.*

Historically, cities and counties have shouldered the responsibility for planning and implementing programs to manage solid waste. Congress recognized this responsibility in providing technical and financial assistance to local governments, while mandating minimum federal standards for waste disposal facilities. 42 U.S.C. § 6901(a)(4) (1988). Local governments understand local needs, local resources and local policies. Based

<sup>17</sup> The preamble to the original Subtitle C regulations recognized that RDF should fall within the household waste exclusion. 45 Fed. Reg. 3309 (May 19, 1980).

in this understanding, they can identify appropriate disposal and collection systems for their communities and choose either to implement those systems themselves or to rely upon private enterprise.

RCRA emphasizes that resource recovery should be considered in developing local plans. 42 U.S.C. §§ 6943(a)(2), 6947(b) (1988). RCRA provides that resource recovery should be considered a viable alternative to landfills. *See, e.g.*, 42 U.S.C. § 6902(a)(1) (1988) (federal assistance for planning resource recovery); § 6942(c)(10) and (11) (1988) (state plans must consider resource recovery facilities and markets for energy recovery); § 6943(c) (1988) (federal assistance for studying feasibility of resource recovery systems); § 6943(d) (1988) (recycling considered in sizing resource recovery facilities).

In the Pacific Northwest, local governments plan waste management under state-wide goals and priorities. Washington's cities and counties began long-term waste management planning in the early 1980s. They must update their plans regularly. Wash. Rev. Code § 70.95.110 (1992). Spokane's ten-year journey through local planning is outlined at pages 1 - 3, above. Spokane's experience illustrates how local conditions and policies shape local waste management decisions. It points out how recycling and resource recovery are options badly needed to address the waste management crisis. Finally, it demonstrates that planning for integrated waste management requires substantial resources and that implementing local choices requires long-term contractual commitments.

*Amici* Skagit County, Marion County and Tacoma have made similar journeys. Each community has different policies and different constraints. Nonetheless, all of them studied and debated landfilling, recycling and resource recovery at the local level and then selected and implemented local choices. *Amici* committed to resource recovery under the belief that RCRA Section 3001(i) excluded ash from Subtitle C. Their



understanding was based on the language of regulations and statutes and on court decisions which had, prior to the Court of Appeals' ruling in this case, uniformly so interpreted Section 3001(i).<sup>18</sup>

The Court of Appeals' decision removes resource recovery as a viable alternative for local governments, contrary to national policy in RCRA. The cost of managing ash from resource recovery as hazardous waste is simply prohibitive.<sup>19</sup> For communities already implementing resource recovery, the consequences are potentially disastrous. The results of a decade of solid waste planning could become useless. Long-term contracts and financing commitments could be jeopardized. Hundreds of millions of dollars of capital improvements could become too costly to maintain. The Court of Appeals' interpretation of RCRA destroys local planning.

#### 4. *The Court of Appeals' Interpretation Undercuts State Ash Management Programs.*

RCRA allows states to develop and administer their own solid and hazardous waste programs.<sup>20</sup> Consistent with RCRA's

<sup>18</sup> *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), *affirmed*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991); *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *cert. granted, vacated and remanded*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303 (7th Cir. 1993).

<sup>19</sup> As explained at pp. 9 - 11, *supra*, material separation would also become cost-prohibitive under the Court of Appeals' reasoning.

<sup>20</sup> By establishing state programs at least as stringent as parallel federal programs, states may administer the Subtitle C hazardous waste program, 42 U.S.C. §§ 6902(a)(7), 6926(b) (1988); obtain federal financial assistance for Subtitle D solid waste programs, 42 U.S.C. §§ 6943(a) (1988), 6945(c) (1988), and 6947(a) (1988); and administer the federal underground storage tank regulatory program, 42 U.S.C. § 6991c (1988).

federal framework, several states created detailed regulatory programs to address management of ash from MSW resource recovery facilities.

For example, Washington enacted an Incinerator Ash Residue Act, Wash. Rev. Code ch. 70.138 (1992), early in 1987. In 1990 the Washington Department of Ecology ("Ecology") promulgated Special Incinerator Ash Management Standards, Wash. Admin. Code ch. 173-306 (1990), to implement the Act. Ash generators in Washington must develop approved ash management plans and implement measures to minimize ash volume, maintain its quality, and provide for its safe transport and disposal. Wash. Admin. Code § 173-306-200 (1990). Ash must be tested quarterly; Ecology monitors the results. *Id.* Ash may be disposed of only in dedicated ash landfills, called monofills, that meet detailed standards for siting, performance, monitoring, and design. Wash. Admin. Code §§ 173-306-350, -450 (1990). Monofill operators must provide financial security to assure their facilities' safe closure. Wash. Admin. Code § 173-306-470 (1990).

Uncertainty regarding the scope of RCRA Section 3001(i) threatens the viability of Washington's ash program. Although developed specifically to address the characteristics of ash from MSW resource recovery, Washington's ash program is not intended to be identical to Subtitle C requirements for hazardous waste management. For example, Washington's ash program does not require each shipment of ash to be tracked with manifest documents in triplicate. *Compare* Wash. Admin. Code ch. 173-306 (1990) *with* 40 C.F.R. § 262.20 (1992). Other states also have programs specifically designed for ash management that are not identical to the Subtitle C program.<sup>21</sup>

<sup>21</sup> *See, e.g.*, Mich. Comp. Laws §§ 299.432a - .432b (1991); Fla. Stat. Ann. § 403.7045 (West Supp. 1992); Fla. Admin. Code ch. 17-702 (1992); Code Me. R. ch. 403 (1990); Mass. Regs. Code title 310, §§ 19.119, .131 (1992); Conn. Agencies Regs. §§ 22a-209-1, -8, -14 (1990); N.Y. Comp.



So long as the Seventh Circuit's decision remains in effect, the status of state ash programs is unclear. At worst, these programs and the resource recovery and ash landfills designed and built in accordance with their provisions could be rendered legally obsolete. Supreme Court review is required to correct the Seventh Circuit's error and to remove the corrosive uncertainty that this decision has produced throughout the country.

### CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF BROWARD COUNTY, FLORIDA,  
CITY OF ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA,  
CITY OF HARRISBURG, PENNSYLVANIA, CITY OF  
INDIANAPOLIS, INDIANA, CITY OF TULSA, OKLAHOMA,  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

No. 92-1639

THE CITY OF CHICAGO, *et al.*,  
 Petitioners,  
 v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
 Respondents.

On Petition for a Writ of Certiorari to the United States  
 Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF  
 BROWARD COUNTY, FLORIDA, CITY OF  
 ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA,  
 CITY OF HARRISBURG, PENNSYLVANIA,  
 CITY OF INDIANAPOLIS, INDIANA, CITY OF TULSA,  
 OKLAHOMA, COUNTY BOARD OF ARLINGTON,  
 VIRGINIA, DAVIS COUNTY SOLID WASTE  
 MANAGEMENT AND ENERGY RECOVERY SPECIAL  
 SERVICE DISTRICT (UTAH), GREATER DETROIT  
 RESOURCE RECOVERY AUTHORITY, JOINT BOARD  
 OF OVERSIGHT FOR THE HAMPTON/NASA/USAF  
 REFUSE-FIRED STEAM GENERATING FACILITY,  
 METROPOLITAN GOVERNMENT OF  
 NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,  
 MINNESOTA RESOURCE RECOVERY ASSOCIATION,  
 MONTGOMERY COUNTY, OHIO, NATIONAL  
 INSTITUTE OF MUNICIPAL LAW OFFICERS,  
 NEW HANOVER COUNTY, NORTH CAROLINA,  
 NORTHEAST SOLID WASTE COMMITTEE,  
 RESOURCE AUTHORITY IN SUMNER COUNTY,  
 TENNESSEE, SOLID WASTE AUTHORITY OF  
 CENTRAL OHIO, SOUTHEASTERN PUBLIC SERVICE  
 AUTHORITY OF VIRGINIA, ST. CROIX COUNTY,  
 WISCONSIN, AND YORK COUNTY SOLID WASTE  
 AND REFUSE AUTHORITY  
 IN SUPPORT OF PETITIONERS

This brief *amici curiae* is submitted in support of the petition for a writ of certiorari filed by the City of Chicago, *et al.*, seeking review of the January 12, 1993 judgment entered by the United States Court of Appeals for the Seventh Circuit. That judgment, and the Seventh Circuit's related opinion, *Environmental Defense Fund, Inc. v. City of Chicago*, 985 F.2d 303 (7th Cir. 1993), were entered following this Court's November 16, 1992 order vacating the Seventh Circuit's previous judgment and remanding this case to the court of appeals. *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992). The Seventh Circuit majority's opinion on remand, 985 F.2d at 304, readopts the majority's 1991 opinion, which concluded that ash residue from the operation of waste-to-energy, resource recovery facilities is subject to the hazardous waste management standards of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939 (1988) (the court of appeals' opinions are reproduced in the Appendix to the petition ("Pet. App.") at 1a-21a; Circuit Judge Ripple dissented in both instances). The Seventh Circuit's decision directly conflicts with the decision of the Second Circuit concerning the identical issue, *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991), and contradicts the plain meaning and clear legislative intent of section 3001(i) of RCRA, 42 U.S.C. § 6921(i), the principal statutory provision at issue. The Seventh Circuit's decision poses a serious obstacle to sound management of the growing municipal solid waste stream in the United States, and requires review by this Court. The parties' letters of consent concerning this brief have been filed with the Clerk of the Court.

#### STATEMENT OF INTEREST OF AMICI

*Amici* vigorously supported the petition for a writ of certiorari that the City of Chicago filed in this matter in

1992 (Brief *Amici Curiae* of the City of Ames, Iowa, *et al.*, No. 91-1328). *Amici* do so again in 1993. *Amici's* interest is directly linked to the current—and increasing—national concern regarding solid waste management. See U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-89-019 (February 1989) (cited below as "*Agenda For Action*"). Simply stated, "we are generating more garbage all of the time, and we don't know what to do with it." *Id.* at 8. *Amici* include cities, counties, and local government agencies who have primary responsibility for managing this growing solid waste stream. Meeting that responsibility has required *amici* and their constituents to concern themselves with all of the public health, environmental and economic aspects of managing the municipal waste stream. That is the context in which *amici* have focused on the development of resource recovery facilities as a very important solid waste management tool.<sup>1</sup>

In some instances *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Alexandria, Virginia; Ames, Iowa; Arlington, Virginia; Broward County, Florida; Harrisburg, Pennsylvania; Indianapolis, Indiana; Montgomery County, Ohio; Nashville, Tennessee; New Hanover County, North Carolina; St. Croix County, Wisconsin; and Tulsa, Oklahoma). Other *amici* are local government agencies and special authorities (Davis County Solid Waste Management and Energy Recovery Special Service District

<sup>1</sup> The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (non-hazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k). A "resource recovery facility" produces energy (steam and electricity) from the combustion of MSW. See 42 U.S.C. § 6903(24).



(Utah); Greater Detroit Resource Recovery Authority; Joint Board of Oversight, Hampton/NASA/USAF Refuse-Fired Steam Generating Facility (Virginia); Resource Authority in Sumner County, Tennessee; Solid Waste Authority of Central Ohio; Southeastern Public Service Authority of Virginia; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (North Andover, Massachusetts)).<sup>2</sup>

*Amici* also include national and regional organizations concerned with solid waste management. *Amicus* National Institute of Municipal Law Officers ("NIMLO") is a non-partisan organization representing more than 1,400 local governments and their attorneys. NIMLO is dedicated to sound resolution of nationally-important legal issues affecting municipalities, including waste management issues. Another of the *amici*, the Minnesota Resource Recovery Association, is an association consisting primarily of public entities working with the private sector in the development, ownership and operation of resource recovery facilities and other types of waste management facilities.<sup>3</sup>

<sup>2</sup> The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing governmental functions concerning waste management on behalf of the following twenty-three Massachusetts communities: Acton, Andover, Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wrentham, Westford, West Newbury, Wilmington and Winchester.

<sup>3</sup> The Minnesota Resource Recovery Association represents waste-to-energy facilities serving the Minnesota counties of Anoka, Beltrami, Benton, Carver, Cass, Clay, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Hubbard, Itasca, Mahnommen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin, and the Minne-

Resource recovery facilities are key components of the integrated waste management systems that many local governments throughout the United States are pursuing (integrated waste management means the complementary use of several waste management methods—source reduction, reuse and recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economical manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as nonhazardous waste consistent with the requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by RCRA's hazardous waste management standards are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 142 resource recovery facilities now operating in the United States produce approximately 8.5 million tons of ash annually. See Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age 26, 28 and 34, Figure 2 (November 1992) (cited below as "*Combustion in North America*") (ash tonnage calculated based on data presented). Aside from the serious financial implications of managing this ash as hazardous waste, *amici* and the hundreds of communities they represent face troublesome enforcement consequences as well. The decision below undermines carefully designed solid waste management plans for *amici* and many other communities throughout the United

sota cities of Red Wing and Fergus Falls. Other members of the Association are: Winona and Dakota Counties, Northern States Power Company, United Power Association, Quadrant Company and Richards Asphalt.



States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

### REASONS FOR GRANTING THE WRIT

As the United States Environmental Protection Agency ("EPA") has noted, there is a "serious and growing solid waste problem in many American cities." *Agenda for Action* at 8. The volume of municipal solid waste in the United States continues to increase steadily. Indeed, for the most recent three-year period for which EPA survey data are available (1988-90), MSW increased by 9 percent—180 million tons to 195.7 million tons. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019, ES-3 (July 1992) (cited below as "1992 Update"); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/530-SW-90-042, ES-3 (June 1990) (cited below as "1990 Update"). Moreover, EPA projects an increase to 222 million tons by the year 2000. *1992 Update* at ES-3.

Selecting the best strategy for managing this growing waste stream has changed over time and poses important policy questions for all levels of government. Although combustion of MSW had previously been widely used, combustion declined into the 1970's and early 1980's as old incinerators were closed down due to increasingly stringent air pollution control standards. *See 1992 Update* at 3-3/3-4. Landfilling of MSW became the primary management alternative, taking 80 percent or more of the municipal waste stream. *Agenda for Action* at 22-23. A serious shortage of landfill capacity and associated health and environmental concerns followed. *See 1992 Update* at 3-4.<sup>4</sup>

<sup>4</sup> Congress warned in 1976 that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste

A principal response to these matters has been the adoption of state and federal laws and policies encouraging development of waste-to-energy, resource recovery facilities (employing state-of-the-art air pollution control systems) as part of integrated solid waste management plans, *supra*, which also include source reduction, recycling, etc. Although more costly in the short run, waste combustion with energy recovery is favored over landfilling, the principal alternative. *See 1990 Update* at 4; *1992 Update* at 1-4; *see also* 54 Fed. Reg. 52209, 52245 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in an MWC [municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste management option (see RCRA section 1002(b)(8)), but it is sound policy to recover the energy value of the combustibles rather than burying them" [citations omitted]).<sup>5</sup> In adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized the need to encourage the use of technology to produce usable energy from waste, which would reduce our reliance on diminishing fossil fuel resources and the burden of disposing of increasing volumes of MSW. 42 U.S.C. § 6941a.

stream, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. § 6901(b)(1) and (8).

<sup>5</sup> Combustion reduces waste volume or mass by approximately 90 percent. *See* Jonathan V.L. Kiser, *A Comprehensive Report on the Status of Municipal Waste Combustion*, Waste Age 109, 156 (November 1990). *See also* Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment").

The result of these laws and policies has been a significant increase since 1985 in the development of resource recovery facilities by local government. But as a consequence of the court of appeals' decision, local government now confronts the specter of RCRA enforcement actions like the instant case and the overturning of solid waste management decisions made with painstaking care by *amici* and many other communities who face possible shutdown of resource recovery facilities and cancellation of new facilities.

1. Turning first to the immediate enforcement impact of the decision below, there are approximately 142 resource recovery facilities presently operating in the United States (and another 49 under construction or in various stages of planning). See *Combustion in North America*, at 28, 30 and Table 3. These facilities manage ash residue subject to RCRA Subtitle D and related state laws as nonhazardous waste; at no time have these facilities managed ash as hazardous waste pursuant to RCRA Subtitle C. Although the impact of the decision below would be most direct in the states that comprise the Seventh Circuit (if the Court does not grant the instant petition, resource recovery facilities in those states would have no choice but to begin managing resource recovery facility ash subject to Subtitle C requirements), the Seventh Circuit's decision poses serious uncertainty—and a Hobson's choice—for essentially all resource recovery facilities (outside the Second Circuit).

One option (in theory) would be to change the facilities' method of operation and begin managing ash residue subject to RCRA Subtitle C. That change in operations would carry a very steep price, however. As explained in more detail below, the cost of managing ash residue as hazardous waste could easily cause current waste management costs to double or triple, far outstripping the financial resources of the affected communities, and would also require dedicating limited hazardous waste landfill

capacity to disposal of benign resource recovery facility ash. See *infra* pp. 10-14 and note 12.

Another approach (for facilities outside the Seventh Circuit) would be to continue to manage ash as non-hazardous waste. But if the instant petition is not granted, there is serious concern that additional suits identical to the suit filed below in the Northern District of Illinois (and the related suit that was filed simultaneously in the Southern District of New York in the *Wheelabrator* case, *supra* p. 2) will be brought against *amici* and many other communities by respondents or similar organizations. Filed under RCRA's citizen suit provision, section 7002 of RCRA, 42 U.S.C. § 6972, these suits can impose injunctive relief and civil penalties of up to \$25,000 per day of violation. *Id.*; see also 42 U.S.C. § 6928(g). The statute of limitations that generally applies in similar civil penalty actions is five years. See 28 U.S.C. § 2462; see also *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73-76 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (applying 28 U.S.C. § 2462 to citizen suits under section 505 of the Federal Water Pollution Control Act). A resource recovery facility produces ash every day that it operates, and it is apparent that failure to conform to the Seventh Circuit's interpretation exposes scores of communities to considerable enforcement risk and substantial civil penalty liability. Granting the petition will eliminate these troubling uncertainties.

2. Aside from these enforcement implications, the decision below will seriously undermine the carefully designed solid waste management plans of many communities and threaten the financial viability of most, if not all, resource recovery facilities due to the cost of managing resource recovery facility ash as hazardous waste. The economic burden that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities. That additional cost burden is, moreover, a



very troubling prospect for communities across the United States who already face serious fiscal problems.

a. As noted earlier, federal and state laws adopted in response to the growing solid waste dilemma vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. In that connection, section 32(a) of the Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. § 6941a, recognizes that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste". The laws of a number of states are very similar. For example, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage resource recovery and establishment of waste-to-energy facilities" with the "goal of reducing land disposal to unusable residuals by the year 2005". Section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ."<sup>6</sup>

Implemented through comprehensive solid waste management planning by local government, these policies have resulted in a significant increase in resource recovery facilities. Between 1985 and 1990 annual combustion

<sup>6</sup> See also Pa. Stat. Ann. title 35, § 6018.102(2) (encouraging the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy"); *Michigan Solid Waste Policy*, *supra* note 5 (establishes goal of managing 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reducing the amount of MSW going to landfills to 10 percent by the year 2005).

of MSW with energy recovery increased from 7.6 to 29.7 million tons. *1992 Update* at 3-2, Table 24; see also *id.* at 3-3. The 1990 level is projected to increase more than 50 percent by the year 2000 and reach 46.2 million tons. *Id.* at 4-16 and 4-18, Table 34. An important source of electric energy, the federal government has projected a seven-fold increase between 1991 and 2010 in the amount of electricity generated in the United States from MSW combustion. See U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' decision is a severe setback—and a classic "Catch-22"—for *amici* and many other communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facilities were not only environmentally superior, but also generally more costly in the short run than landfilling MSW.<sup>7</sup> If the ash residue from a resource recovery facility must now be managed subject to hazardous waste standards, operating costs will increase dramatically. In this connection recent EPA data show that the cost of disposal in a hazardous waste landfill is ten times the cost of disposal at a nonhazardous waste (Subtitle D) landfill:

Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00 per ton.

<sup>7</sup> The processing or "tipping" fees charged by modern resource recovery facilities are generally \$40 to \$100 per ton of municipal solid waste processed. Kiser, *supra* note 5, at 156. In contrast, the 1990 average landfill tipping fee in the United States was \$26.56 per ton. National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991).



Memorandum from William K. Reilly, Administrator, U.S. EPA, to All Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 7 (September 18, 1992), *reprinted in* Pet. App. 41a, 48a-49a. As a consequence of that more than tenfold increase in ash disposal costs, the tipping fees charged by individual resource recovery facilities could easily double or triple.<sup>8</sup>

Finally, these increases in MSW management costs need to be considered in context. Protection of public health and the environment is a primary concern of *amici* and a principal factor underlying development of resource recovery facilities by the communities *amici* represent. Nevertheless, the cost of complying with federal environmental mandates has become a serious concern for local government. *See* Ohio Municipal League, *Ohio Metropolitan Area Cost Report for Environmental Compliance* (September 15, 1992); Municipality of Anchorage, Alaska, *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (January 1993). Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, EPA has established the Local Government-Small Community Advisory Committee to address these financial concerns and related matters. *See* 57 Fed. Reg. 54393 (November 18, 1992). But as a consequence of the court of appeals' decision, many communities across the United States that are already grappling with serious fiscal problems now face an additional burden—a dramatic increase in waste management costs far beyond the level of cost anticipated when those communities chose

<sup>8</sup> MSW combustion ash amounts to approximately 25 percent (dry weight) of unprocessed MSW input. *1992 Update* at 3-3. Accordingly, the tipping fee for each ton of MSW processed would generally include the cost to dispose of 0.25 tons of ash (*i.e.*, 25 percent of \$453 or approximately \$113). With the increases in ash disposal cost noted above, a tipping fee currently in the range of \$50 per ton of MSW processed (*see supra* note 7) would triple.

resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing resource recovery facilities to shut down, and future development of new facilities would essentially be eliminated, contrary to RCRA's policy of encouraging resource recovery.<sup>9</sup>

b. One additional point should be noted in this regard. Hazardous waste landfill capacity is quite limited. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.<sup>10</sup> Only one hazardous waste landfill has been permitted since 1987 (in fact, only one hazardous waste landfill has been permitted during the past twelve years).<sup>11</sup> Moreover, since this case was initially before the Court, the number of hazardous waste landfills has declined by one, and there are now only 20 hazardous waste landfills in the United States. *See* William Gruber, *TSD Summary 1993*, EI Digest 14, 17 (January 1993).

<sup>9</sup> It is likely to be more economic for many communities to shut down their resource recovery facilities, landfill the communities' MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facilities rather than operate the facilities and have to absorb the cost to manage ash residue as hazardous waste. *See supra* notes 7 and 8. Moreover, the potential liability associated with navigating the complex scheme of federal hazardous waste regulations would further discourage the use of resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

<sup>10</sup> *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

<sup>11</sup> This is the Last Chance, Colorado hazardous waste landfill, which began operation in July, 1991. *See* Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest 24 (March 1992). Last Chance has 2.5 million tons of capacity. *Id.* at 26.

Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon. On the other hand, resource recovery facilities currently in operation produce approximately 8.5 million tons of ash each year. *See supra* p. 5. If as a result of the decision below that ash is required to be disposed in hazardous waste landfills, it can readily be seen that all of the United States' current hazardous waste landfill capacity could be consumed within a very short period.

3. Finally, the court of appeals' decision is wrong as a matter of statutory construction. This Court has often stated that in determining the meaning of a statute, courts should look to the particular statutory language at issue within the context of the statute as a whole, including its object and policy. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990). The Seventh Circuit's narrow reliance on the absence of the word "generation" in section 3001(i) to conclude that resource recovery facility ash is subject to hazardous waste regulation ignores that fundamental tenet of statutory construction (section 3001(i) is reproduced in the Appendix to this brief).

a. When Congress adopted section 3001(i) as part of the 1984 amendments to RCRA, EPA's 1980 "household waste exclusion" unambiguously excluded from hazardous waste regulation the ash residue that remains following combustion of household waste. *City of Chicago*, 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). Adopted as part of EPA's regulations governing RCRA's hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976) (RCRA's hazardous waste management program "is not to be used to control the disposal of substances used in households or to extend

control over general municipal wastes based on the presence of such substances"))). EPA concluded that "[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to "all phases of [the] management" of household waste, including ash residue after treatment, such as incineration.

Congress is presumed to know an agency's interpretation of a law pertinent to legislation Congress is enacting, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and when Congress enacted section 3001(i) in 1984 the regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation because the household waste exclusion already encompassed "all phases" of the "management" of *household* waste. The focus of Congress' "clarification" in 1984 was whether EPA's 1980 regulation limiting the exclusion only to household waste—as opposed to including waste from non-household sources that contribute to the municipal waste stream (*e.g.*, small commercial and industrial establishments, schools, etc.)—was consistent with Congress' intent. As explained in the Senate Report that accompanied this legislation:

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. \* \* \* *New section 3001[d] [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of*



*household waste and non-hazardous waste from other sources.*

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis added). Directly reflecting that intent, the statute provides that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are not received at or burned at the facility. 42 U.S.C. § 6921(i).

In short, the plain language of the section 3001(i) "clarification" does nothing to terminate the prior exclusion for ash from resource recovery facilities that burn household waste. Instead, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns household waste and nonhazardous waste from sources other than households (e.g., commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or burn hazardous waste.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). Nothing in the legislative history even remotely suggests that Congress, by not including the word "generation", intended the result reached by the court of appeals. To the contrary, since 1976 Congress has on numerous occasions expressed its intent to promote resource recovery facilities. See, e.g., 42 U.S.C. § 6902(a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). In fact, the Senate Report accompanying sec-

tion 3001(i) explicitly states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284, *supra*, at 61.

Key legislative history confirms that section 3001(i) excludes resource recovery facility ash from hazardous waste regulation. The Senate Report, *supra*, accompanying the legislation describes the section 3001(i) exclusion as follows: "All waste *management* activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion. . . ." S. Rep. No. 284, at 61 (emphasis added). Put another way, Congress unequivocally intended to exclude "all waste management" activities associated with resource recovery facilities from hazardous waste management standards. That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes generation of hazardous waste, are excluded (the Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change; H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984)). When examined in this overall legislative context, the court of appeals' reliance on the absence of the word "generation" in section 3001(i) is plainly incorrect.<sup>12</sup>

<sup>12</sup> The Seventh Circuit's decision may also result from a misconception regarding the nature of landfilled MSW and MSW combustion ash. The court of appeals said "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, MSW combustion ash poses far less environmental concern than landfilling of MSW. See *supra* note 5; see also State of Florida, Division of Administrative Hearings, *Final Order Approving Certification, Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility* (No. 90-3942EPP), at 3-4 (June 19, 1992) (adopting Recommended Order's finding of fact ¶ 7 (De-



b. Finally, when this case initially was before the Court, the Solicitor General argued that the language of section 3001(i) was unclear and, therefore, reviewing courts should defer to the reasonable interpretation of section 3001(i) set forth in the EPA Administrator's September 18, 1992 memorandum, *supra* pp. 11-12. Brief for the United States as Amicus Curiae, No. 91-1328, at 8, 12 (on petition for a writ of certiorari) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). On remand, the Seventh Circuit declined to defer to the EPA Administrator's interpretation on the grounds that the EPA Administrator's memorandum was yet another change in EPA's position on the issue. 985 F.2d at 304.

*Amici* continue to believe that the statutory language, taken as a whole, exempts resource recovery facility ash from hazardous waste regulation. Nevertheless, should this Court conclude that section 3001(i) is ambiguous, the Seventh Circuit's refusal to defer to the EPA Administrator's reasonable interpretation of section 3001(i) was wrong. *See, e.g., Chevron*, 467 U.S. at 843-44. Revised agency interpretations deserve deference, *e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991), as agencies may

cember 9, 1991) that leachate from MSW combustion ash is far less of an environmental concern than the leachate from MSW). In fact, MSW combustion ash is now being beneficially reused in a variety of applications, including road construction and as a raw material in cement manufacturing. *See* Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power 18 (September/October 1992). The Seventh Circuit's above-quoted statement also appears to have been made without considering the record in this case—disposal of ash at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. Pet. at 7. Those disposal standards are generally required by Michigan law, Mich. Comp. Laws § 299.432a (the monofill is in Michigan) and typical of the laws of a number of other states. *See, e.g., Mass. Regs. Code* title 310, § 19.119. *See also* 40 C.F.R. part 258 (adopting stringent federal criteria for municipal landfills and monofills receiving MSW combustion ash).

need to revisit such matters on a continuing basis. *See Chevron*, 467 U.S. at 863-64. Moreover, this is not a case where an agency has reversed an authoritative position on an issue of statutory interpretation.<sup>13</sup> Thus, even if this Court finds the language of section 3001(i) to be ambiguous, deference should be granted to the EPA Administrator's reasonable interpretation of the statute, namely, that resource recovery facility ash is not subject to hazardous waste regulation under RCRA.

In sum, the Seventh Circuit's interpretation of section 3001(i) jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to clearly expressed federal policy. To resolve the conflict in the Circuits and clarify this impor-

<sup>13</sup> While EPA's 1985 regulatory preamble suggests an interpretation of section 3001(i) that would not exempt MSW ash that "routinely exhibits" hazardous waste characteristics, the preamble concludes with EPA stating that "[it] does not believe the [1984 RCRA amendments—including section 3001(i)] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28702, 28726 (July 15, 1985). Importantly, that concluding statement is made after EPA restates its preexisting 1980 policy that MSW ash is not subject to regulation as hazardous waste. *Id.* at 28725. Subsequent statements by EPA officials only demonstrate the Agency's apparent struggle to resolve the confusion surrounding the 1985 preamble. *See Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987) (statement of J. Winston Porter, EPA Asst. Administrator, Office of Solid Waste and Emergency Response) (after reconsideration of its 1985 statements, EPA believes section 3001(i) was intended to exempt MSW ash); *Regulation of Municipal Solid Waste Incinerators*, *supra* note 10, at 33 (statement of Sylvia Lowrance, EPA Director, Office of Solid Waste) (EPA continues to follow its 1985 interpretation).

tant issue of federal environmental law, this Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

### CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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### APPENDIX

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

#### (i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

##### (1) such facility—

##### (A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

No. 92-1639

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

**BRIEF OF THE PETITIONERS**

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### QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash generated by burning municipal solid waste at such a facility.

(i)

## PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1639

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THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit**

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**BRIEF OF THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals upon remand from this Court, Pet. App. 1a-4a, is reported at 985 F.2d 303 (7th Cir. 1993). The initial opinion of the court of appeals, Pet. App. 5a-21a, is reported at 948 F.2d 345 (7th Cir. 1991), vacated and remanded, 113 S. Ct. 486 (1992). The district court's memorandum opinion and order, Pet. App. 22a-33a, is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

**JURISDICTION**

The judgment of the court of appeals upon remand from this Court was originally entered by an unpublished order issued on January 12, 1993. The court of appeals

issued a published decision on January 29, 1993. The petition for a writ of certiorari was filed on April 12, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

#### STATUTE INVOLVED

42 U.S.C. § 6921(i)

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

#### STATEMENT

1. *Background.* This country faces a solid waste disposal crisis of national proportions. See 42 U.S.C. § 6901(a), (b). In 1988, we generated approximately 180 million tons of municipal solid waste—the “residential and commercial solid wastes generated within a community” (40 C.F.R. § 241.101(k) (1991)); that number is projected to grow to 216 million tons by the year 2000. See 56 Fed. Reg. 50978, 50980 (1991) (summarizing the findings of an Environmental Protection Agency study). Much of that waste is now deposited in landfills.

In 1976, when Congress first enacted the Resource Conservation and Recovery Act (RCRA), it warned that “alternatives to existing methods of land disposal must be developed since many of the cities of the United States” are running out of waste disposal sites. 42 U.S.C. § 6901(b)(8). More recently, when it enacted the Solid Waste Disposal Act Amendments of 1980, Congress identified one such alternative: “the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste.” *Id.* § 6941a(3). See also *id.* § 6941a(2) (“solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials”). Facilities that extract reusable materials from municipal solid waste or convert solid waste into energy are classified as “resource recovery” facilities under RCRA, 42 U.S.C. § 6903(24).

The general federal statutes and regulations governing waste disposal are an important part of the regulatory matrix applicable to the operation of resource recovery facilities. When Congress enacted RCRA, it directed that “hazardous waste” be managed pursuant to an elaborate regulatory scheme—set forth in Subtitle C of the statute—



that establishes standards for the treatment, storage, and disposal of such waste. See 42 U.S.C. §§ 6921-6939.<sup>1</sup> Generators of hazardous waste must obtain an identification number from the United States Environmental Protection Agency (EPA) before engaging in the treatment, storage, transportation, or disposal of hazardous wastes. See 40 C.F.R. § 262.12 (1991). Hazardous waste must be packaged, labelled, and marked according to specific regulations before it may be shipped. See *id.* § 262.30-262.33. It may be held only in approved containers and only for specified periods of time. See *id.* § 262.34. Facilities that treat, store, or dispose of hazardous waste must obtain permits (see 42 U.S.C. § 6925), and must comply with many regulations setting performance standards for such facilities. See *id.* § 6924; 40 C.F.R. § 264.1-264.1065 (1991).

Disposal of non-hazardous waste is regulated under Subtitle D of RCRA, which provides less stringent regulation than Subtitle C. See 42 U.S.C. §§ 6941-6949. The EPA has promulgated regulations setting minimum national standards for landfills that accept non-hazardous waste. See 56 Fed. Reg. 50978 (1991).

Waste from homes and offices sometimes contains some components that qualify as hazardous waste under the federal scheme, but Congress made clear in the legislative history of RCRA that it did not intend to regulate such "general municipal wastes" as hazardous waste. S.

<sup>1</sup> The statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5).

Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). The EPA subsequently promulgated a regulation—the "household waste exclusion"—providing that "any material \* \* \* derived from households (including single and multiple residences, hotels and motels \* \* \*) is not a hazardous waste within the meaning of the statute. 45 Fed. Reg. 33120 (1980) (subsequently codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). This exclusion permits the disposal of all household waste in a Subtitle D landfill, even if some small portion of the waste would otherwise qualify as hazardous waste under the generally applicable statutory standard, perhaps because it contains, for example, such household items as a can of pesticide, paint thinner, or nail polish remover. At the time the EPA issued this regulation, it stated that the exclusion extended to ash remaining after household waste was burned in an incinerator. "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33098 (1980).

In 1984, Congress added a new provision to RCRA—Section 3001(i)—entitled "Clarification of household waste exclusion." It states in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purposes of regulation under this subchapter" if the facility receives and burns only (a) household waste and (b) commercial and industrial solid waste that does not contain hazardous waste. 42 U.S.C. § 6921(i).<sup>2</sup>

<sup>2</sup> In addition, the facility may not accept hazardous waste, and the owner or operator of the facility must "establish[] contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. § 6921(i)(2).

The Senate Committee Report accompanying this provision observed that resource recovery facilities often take in household waste mixed with non-hazardous waste from other sources, such as schools, churches, and municipal buildings. The committee stated that

[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).

The question in this case is whether, under Section 3001(i), the ash residue remaining after solid waste is burned in a resource recovery facility may be disposed of in a Subtitle D disposal facility, regardless of whether the ash might otherwise qualify as a hazardous waste under the generally applicable standard.

2. *The Chicago Resource Recovery Facility.* The City of Chicago owns and operates a resource recovery facility, the Northwest Waste-to-Energy Facility ("Northwest Facility"), where it burns municipal solid waste and generates electricity, thereby reducing the volume of waste disposed of in landfills and helping to reduce dependence on imported oil for the generation of electricity. The facility processes approximately 14% of the municipal solid waste produced in Chicago. R. 18. Every 10,000 cubic yards of refuse is reduced to 1,000 cubic yards of residue. *Ibid.* The facility also produces steam by recovering the energy generated from the combustion of the waste. The facility not only uses the steam for its own operations, but also sells it for \$1 million to nearby industry and for another \$500,000 to the local utility. *Ibid.* Finally, the facility recovers approximately 55 tons

of tin cans and other ferrous metals each day, which are sold to scrap metal dealers. *Ibid.*

At the time that this case was before the district court, the City disposed of the ash remaining at a sanitary landfill located in Three Oaks, Michigan, that received only municipal incinerator ash. R. 18. This is a lined landfill with a leachate collection system and groundwater systems to monitor its performance. *Ibid.*<sup>3</sup> The City does not test the ash produced at the Northwest Facility to determine whether it would be classified as hazardous under EPA regulations, and has not managed the ash as a hazardous waste.

3. *The Proceedings Below.* The Environmental Defense Fund and Citizens for a Better Environment (hereinafter collectively referred to as EDF) filed the complaint in this case, alleging that the City violated several provisions of RCRA, 42 U.S.C. §§ 6901-6992(k), by not handling the ash produced at the Northwest Facility as a hazardous waste pursuant to Subtitle C of RCRA. R. 1.<sup>4</sup> EDF simultaneously filed a similar action in the Southern District of New York against Wheelabrator Technologies, Inc., and Westchester Resco Co., which own and operate a resource recovery facility in Peekskill, New York. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991).

<sup>3</sup> The ash is now disposed of at a lined landfill that receives only municipal incinerator ash that is located near Joliet, Illinois.

<sup>4</sup> EDF alleged that it has members who live near the Northwest Facility and the Three Oaks Landfill whose health, economic, aesthetic, and environmental interests have been or may be affected by the City's allegedly illegal conduct. R. 1 at paras. 4-5. Section 7002 of RCRA authorizes a private right of action against persons or governmental entities alleged to have violated the statute. See 42 U.S.C. § 6972.



In this case, the parties filed cross motions for summary judgment R. 18, 30. The City's position was that Section 3001(i) exempted the process of incinerating waste and producing ash at a resource recovery facility from regulation as hazardous waste. In addition to filing its own motion for summary judgment, EDF opposed the City's motion on the ground that the City had not yet demonstrated that the City's facility met the requirements of Section 3001(i).

The district court concluded that Section 3001(i) of RCRA exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. Pet. App. 22a. The court held that when Congress amended RCRA to exempt resource recovery facilities from hazardous waste regulations, it intended to exclude all waste management activities at these facilities from regulation. *Id.* at 28a. The district court found that this conclusion was consistent with RCRA's policy goal of encouraging resource recovery facilities and removing impediments that may hinder their development and operation. *Ibid.* The district court, however, denied both motions for summary judgment, and allowed EDF additional discovery to determine whether the Chicago facility followed the procedures required under Section 3001(i) for excluding the intake of hazardous wastes at the Northwest Facility. *Id.* at 33a. After extensive discovery, EDF stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and would not oppose a renewed motion for summary judgment by the City. R. 91. The district court subsequently granted the City's renewed motion for summary judgment. Pet. App. 34a.

A divided court of appeals reversed. The majority held that the ash generated by a municipal solid waste incinerator must be disposed of in accordance with the provisions of Subtitle C of RCRA. Pet. App. 18a, 20a. The majority concluded that the Section 3001(i) excep-

tion from hazardous waste regulations when a resource recovery facility is "treating, storing, disposing of, or otherwise managing" waste, does not explicitly exempt the ash "generated" by such facilities. *Id.* at 18a-19a. The majority acknowledged that the only other appellate court to address this issue, the Second Circuit in the *Wheelabrator* case, had reached the opposite conclusion. *Id.* at 8a.<sup>5</sup> Judge Ripple dissented, stating that he would affirm for the reasons stated in the Second Circuit and Southern District of New York opinions. Pet. App. 21a.

The City filed a petition for a writ of certiorari. EDF acknowledged the square conflict with the decision in *Wheelabrator* and agreed that the case presented an important question of federal law. Brief for Respondent, No. 91-1328, at 8 (on petition). EDF urged the court to grant certiorari. *Id.* at 8, 12, 17. The Court then invited the views of the Solicitor General.

On September 18, 1992, while the Court was awaiting the views of the Solicitor General, the Administrator of the EPA issued a memorandum setting forth EPA's determination that Section 3001(i) of RCRA exempted from hazardous waste regulation under Subtitle C the ash generated by the combustion of municipal solid waste at resource recovery facilities. Pet. App. 41a. Shortly thereafter, the Solicitor General responded to the Court's invitation by writing that, in his view, the courts should defer to EPA's interpretation of Section 3001(i), and suggesting that the petition be granted, the decision vacated, and the case remanded to the Seventh Circuit for further consideration in light of the Administrator's memorandum. Brief for the United States as Amicus Curiae, No. 91-1328, at 7, 13, 18 (on petition). The Court

<sup>5</sup> In that case, the Second Circuit concluded that Section 3001(i) of RCRA exempted the ash remaining after incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d at 213.



entered the suggested order. *City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (granting, vacating, and remanding).

On remand, the same panel of the court of appeals again divided and reaffirmed its previous decision. The majority held that the EPA memorandum did not affect its opinion or judgment in this case. Pet. App. 2a. Judge Ripple again dissented, stating that the EPA's action deserved deferential review and that, accordingly, he would affirm the judgment of the district court. *Id.* at 3a-4a.

### SUMMARY OF ARGUMENT

One of the objectives of RCRA is to promote resource recovery, 42 U.S.C. § 6902, because resource recovery facilities that burn municipal solid waste recover energy from solid waste and reduce the volume of solid waste disposed of in landfills. Congress determined that resource recovery would not be feasible if the facilities had to comply with the complex and costly regulations governing hazardous wastes. Congress therefore enacted Section 3001(i) of RCRA, *id.* § 6921(i), to exempt resource recovery facilities from those regulations.

The plain language of Section 3001(i) exempts the ash produced when a resource recovery facility treats municipal solid waste by incineration from regulation as a hazardous waste. That section provides, in pertinent part, that:

[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] \* \* \*.

42 U.S.C. § 6921(i). This language exempts all the waste management activities of a resource recovery facility from Subtitle C regulation, including the production and

subsequent disposal of the ash residue of incineration. The incineration of waste that produces the ash at a resource recovery facility falls squarely within the statutory definition of "treatment," see *id.* § 6903(34), while disposal of the ash at a landfill falls squarely within the definition of "disposal," *id.* § 6904(3). The storage of ash until it is sent to a landfill is plainly covered by the statutory definition of "storage." See *id.* § 6903(33). The phrase "otherwise managing" encompasses all other handling of the ash produced at a resource recovery facility, including the collection of ash and its transportation to a landfill. See *id.* § 6903(7). Thus the plain terms of Section 3001(i) provide that a resource recovery facility does not store, treat, manage, collect, transport or dispose of hazardous waste and, therefore, need not comply with Subtitle C regulations.

The court of appeals found it significant that Section 3000(i) does not exempt materials "generated" by a resource recovery facility from regulation as hazardous waste. Pet. App. 10a. But the absence of the term "generated" in Section 3001(i) does not mean the ash produced at an incinerator must be managed as a hazardous waste. Congress had no reason to include "generation" within the statute. Everything that a resource recovery facility does to the municipal waste it burns is covered by the words found in Section 3001(i). Adding the term "generation" would therefore have added mere surplusage to the statute. Surely the scope of the exemption found in Section 3001(i) should be determined by examining the breadth of the terms that Congress actually put there, rather than by speculating about why Congress did not add some other term to the statute.

In addition, exempting the ash is consistent with the design of RCRA as a whole and its objects and policy. In RCRA, Congress repeatedly recognized that resource recovery should be encouraged as an alternative to disposing of raw garbage in landfills. See 42 U.S.C. §§ 6901(b),

(c), (d); 6902; 6941(a)(2), (3). Exempting all waste management activities of resource recovery facilities from hazardous waste regulation, including management of the ash residue of treatment, was one of the major ways in which Congress chose to further its goal of encouraging resource recovery. If ash must be treated as hazardous waste, the cost of resource recovery will skyrocket, and the exemption will fail to achieve Congress's expressed goal of promoting resource recovery facilities. And if the ash is not exempt from regulation, the scope of Section 3001(i)'s exemption will become implausibly narrow. These facilities take in only non-hazardous waste, which they could dispose of free from Subtitle C regulations even without regard to the exemption provided in Section 3001(i). The only meaningful exemption Section 3001(i) provides is an exemption for the ash remaining after incineration. The court of appeals' construction of the statute thus renders Section 3001(i) a practical nullity; that section could not possibly achieve Congress's goal of promoting resource recovery facilities if construed so narrowly.

The legislative history of Section 3001(i) confirms that Congress intended to exempt ash from Subtitle C regulations. The Senate Report that accompanied the legislation demonstrates that Congress intended a broad exemption for all waste management activities of resource recovery facilities in order "to encourage commercially viable \* \* \* facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Requiring ash to be regulated as a hazardous waste would vastly increase the costs of operating such a facility, and erect a substantial impediment to their operation and commercial viability. The legislative history also indicates that Congress intended to expand, not severely contract, the EPA's household waste exclusion, which unquestionably extends to the ash remaining after household waste has been treated by incineration.

Finally, if this Court should conclude that Section 3001(i) is ambiguous, it should defer to the EPA's interpretation of the statute, set forth in the Administrator's recent memorandum. See Pet. App. 41a-49a. That memorandum, which interprets Section 3001(i) to exempt the ash produced at a resource recovery facility from regulation as a hazardous waste, is entitled to deference; for it is rational, consistent with the statute, and informed by EPA's expert assessment of the need to promote resource recovery, and of the limited risk to the environment if ash is placed in Subtitle D landfills.

### ARGUMENT

#### **SECTION 3001(i) OF RCRA EXCLUDES THE ASH PRODUCED AT A RESOURCE RECOVERY FACILITY THAT BURNS HOUSEHOLD WASTE AND NON-HAZARDOUS COMMERCIAL WASTE FROM REGULATION AS A HAZARDOUS WASTE.**

Congress had two objectives when enacting RCRA: "to promote the protection of health and the environment *and* to conserve valuable material and resources \* \* \*." 42 U.S.C. § 6902 (emphasis added). One of the ways it chose to further these two goals simultaneously was to encourage and promote resource recovery, *ibid.*, because resource recovery facilities that incinerate solid waste both recover energy from solid waste and reduce the volume of solid waste that is disposed of in landfills. To encourage resource recovery, Congress exempted resource recovery facilities from the complex regulations governing hazardous waste by enacting Section 3001(i) of RCRA. 42 U.S.C. § 6921(i). The plain language of this section, its legislative history, and the EPA's interpretation of the statute all support the conclusion that the ash produced when a resource recovery facility treats waste by burning is exempt from regulation as a hazardous waste. Any other interpretation would frustrate Congress's clear purpose in enacting Section 3001(i).



**A. The Plain Language Of Section 3001(i) Exempts The Ash Residue Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.**

It is a fundamental principle of statutory interpretation that the inquiry must begin with the language of the statute itself and that the statute must be interpreted in accordance with its plain meaning. See, e.g., *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989); *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 3001(i) provides, in pertinent part, that

[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] \* \* \*.

42 U.S.C. § 6921(i). A resource recovery facility covered by Section 3001(i) takes in household waste and non-hazardous commercial waste. See 42 U.S.C. § 6921(i)(1). The waste is transported to the facility; it may be stored; it is treated by incineration, and the ash residue resulting from incineration is disposed of in a landfill. The plain language of Section 3001(i) exempts each of these waste management activities from regulations governing the management of hazardous waste. That section therefore exempts the production of ash and subsequent disposal of the ash produced when solid waste is incinerated at a resource recovery facility.

RCRA defines each of the terms used in Section 3001(i). "Treatment" is defined to mean "any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(34). Incineration of the waste taken in at a resource recovery facility falls squarely within the statutory definition of

treatment since it changes the physical and chemical character of the waste to reduce its volume.<sup>6</sup> "Storage" of hazardous waste "means the containment of hazardous waste either on a temporary basis or for a period of years, in such a manner as to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33). "Disposal" in turn is defined as

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any other constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). This term plainly encompasses the disposal at a landfill of the ash residue of the treatment process at a resource recovery facility. "Management" of hazardous waste "means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). The phrase "otherwise managing hazardous wastes" accordingly exempts the collection, storage, and transportation of the waste as well as the other activities that occur at a resource recovery facility.

Thus, the plain terms of Section 3001(i) provide an exemption from Subtitle C hazardous waste regulations for every step of the process—the incineration, collection, storage, transportation, disposal, or other managing of the ash produced at resource recovery facilities like the Northwest Facility. There is nothing these facilities do with ash that is not within the ambit of the statutorily defined terms found in Section 3001(i).

<sup>6</sup> When solid waste is burned, its organic, or carbonic based elements, decompose. The remaining ash contains metals that are not combustible. These metals are, of course, the same metals that were contained in the solid waste received at the facility.



The Seventh Circuit focussed on the absence of the word "generated" in Section 3001(i) to conclude that the ash may be regulated as a hazardous waste. See Pet. App. 10a ("Section 3001(i) does not explicitly exempt the ash generated from the resource recovery facility"). The absence of that word is of no significance, for a number of reasons.

First, Congress did not need to add the term "generated" to Section 3001(i) to ensure that the ash produced at a municipal incinerator is exempt from regulation as hazardous waste because the language it did put into Section 3001(i) already made that clear. The plain meaning of the terms Congress used provide an exemption for everything the resource recovery facility does—from start to finish. Adding the term "generated" would have accomplished nothing, aside from cluttering the statute with surplusage. Questions of statutory construction should be decided by ascertaining the meaning of the words Congress has enacted into law, rather than by speculating about why it did not enact some other word as well, especially when the additional word could hardly change the meaning of the terms Congress actually employed. Cf. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947))).

Second, the court of appeals' view that the "generation" of ash at a resource recovery facility is subject to regulation under Subtitle C of RCRA flies in the face of the language that Congress enacted in Section 3001(i). If the production of ash through incineration generates hazardous waste subject to regulation under Subtitle C, then, as the court of appeals held, the facility is required to store, transport, and dispose of the ash as hazardous

waste. But this is inconsistent with the plain language of Section 3001(i), which provides that these resource recovery facilities "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. § 6921(i). The court of appeals unquestionably "deemed" the City to be storing, disposing of, and managing hazardous waste at the Northwest Facility—it held that incineration generates hazardous waste and directed the City to handle the ash as hazardous waste. The statute itself provides otherwise, and precludes a construction that "deems" the Northwest Facility to be storing, transporting, or disposing of hazardous waste subject to Subtitle C regulation.

Third, the court of appeals misunderstood the meaning of "generated" under RCRA when it questioned why Congress did not include that term in Section 3001(i). Congress had no need to include the term "generation" in that section because a resource recovery facility does not "generate" waste within the meaning of RCRA. Under the statute, material becomes a solid waste when it is discarded. See 42 U.S.C. § 6903(27). See also *American Mining Congress v. EPA*, 824 F.2d 1177, 1183, 1193 (D.C. Cir. 1987).<sup>7</sup> The solid waste that is managed and treated at a resource recovery facility is therefore "generated" when a household or business discards it before it is picked up and hauled to the resource recovery facility. When a resource recovery facility incinerates that solid waste, it accordingly is not "generating" waste. Instead, it is treating material that is already a solid waste. The ash, which is the residue of that treatment, then may be disposed of in a landfill, since Section 3001(i) in plain terms exempts treatment and disposal of waste from Subtitle C regulation.

<sup>7</sup> Hazardous waste is a subset of solid waste. See 42 U.S.C. § 6903(5); *American Mining Congress*, 824 F.2d at 1179.

**B. The Object And Purpose Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.**

In determining the meaning of a statute, this Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Accord, *e.g.*, *Commissioner v. Engle*, 464 U.S. 206, 217 (1984); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118-19 (1983). Here, the stated policy goals and objectives of RCRA reaffirm what the plain language of the statute indicates—that Congress intended to exempt all the waste management activities of resource recovery facilities, including management of the ash residue, from Subtitle C regulations. This conclusion is dictated by Congress's goal of encouraging the development of resource recovery facilities to address the solid waste crisis.

Congress has repeatedly recognized that resource recovery facilities are to be encouraged as an alternative to disposing of untreated garbage in landfills. RCRA contains Congress's findings:

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

\* \* \* \*

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

42 U.S.C. § 6901(b)(1), (8). Congress also found that

(1) millions of tons of recoverable material which could be used are buried each year;

\* \* \* \*

(3) the recovery and conservation of such materials can reduce the dependence of the United States on

foreign resources and reduce the deficit in its balance of payments.

42 U.S.C. § 6901(c)(1), (3); and that

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(d)(2), (3).

When Congress amended Subtitle D of RCRA in 1980, it specifically found that

(2) solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;

(3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste \* \* \*.

42 U.S.C. § 6941a(2), (3).

RCRA's objectives are consistent with these findings. RCRA states that

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resources recovery and resource conservation systems) which will promote improved solid waste management techniques \* \* \*;

\* \* \* \*



(10) promoting the demonstration, construction and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

42 U.S.C. § 6902(1), (10), (11). Thus, one of the major goals of RCRA is to encourage the use of resource recovery facilities. Excluding all the waste management activities of resource recovery facilities from hazardous waste regulations was one of the ways that Congress chose to further that goal.<sup>8</sup> The Seventh Circuit's holding that the ash is not within the exemption frustrates Congress's goal of encouraging the development and operation of resource recovery facilities because it subjects them to the potentially enormous expense of managing ash residue as a hazardous waste.

In its September 1992 memorandum, EPA noted that the cost of Subtitle C disposal averages more than ten times the cost of Subtitle D disposal.

The cost associated with the disposal of MWC [municipal waste combustion] ash in Subtitle C facilities are dramatically higher than in Subtitle D landfills. Although the costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D facility: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00

<sup>8</sup> Section 3001(i) is one of a number of provisions that Congress has enacted to encourage the construction and use of resource recovery facilities. See, e.g., 42 U.S.C. §§ 6943(a)(6), 6943(c)(1), 6948(d)(3).

per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

Pet. App. 48a-49a.<sup>9</sup>

Based on these figures, EPA concluded that "[f]or non-hazardous municipal solid waste that can be disposed of in either a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of these two alternatives is significantly impacted by the application of Section 3001(i) to MWC ash." Pet. App. 48a (footnote omitted). This tenfold increase in cost will, as EPA concluded, likely create a "strong economic incentive \* \* \* to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust the waste in resource recovery facilities." *Ibid.* With resource recovery facilities laboring under such a huge cost disadvantage if they are subject to Subtitle C regulation, there could be no meaningful chance to achieve the statutory goal of promoting resource recovery. Congress could not have intended a result that made Section 3001(i) almost entirely ineffective in achieving its expressed objective. Congress plainly intended that resource recovery facilities incur lower costs of complying with federal waste regulation than do Subtitle C facilities. The result below,

<sup>9</sup> Based on these average figures, the increased costs for the City's Northwest Facility, which disposes of between 110,000 and 140,000 tons of ash annually (Pet. App. 6a), could amount to as much as \$57 million each year, if all its ash had to be managed as a hazardous waste. This EPA cost estimate is consistent with other estimates of the cost differential between subtitle C and D landfills. Compare National Solid Waste Management Association, *1990 Landfill Tipping Fee Survey* at 7 (cost of disposing of a ton of waste at a Subtitle D landfill in the midwest averages \$23.25), with ICF, Inc., *1990 Survey of Selected Firms in the Commercial Waste Management Industry: Draft Report* (Sept. 17, 1991) (conservative estimate of the cost of stabilizing and disposing of a ton of waste at a Subtitle C landfill is \$210).



however, is utterly inconsistent with this express congressional objective.

Even aside from the economic implications of the decision below, the court of appeals' construction of Section 3001(i) is inconsistent with logic and common sense. If the exception from hazardous waste regulations in Section 3001(i) does not extend to disposal of ash, the exemption would be rendered implausibly narrow. The ash residue of incineration is the only waste a resource recovery facility disposes of in large quantities, and it is the only potential hazardous waste such facilities collect, store, transport or dispose of. That is because Section 3001(i) by its own terms applies only to resource recovery facilities that accept household waste and non-hazardous commercial waste; it does not apply to a facility that accepts waste that Congress or EPA has identified as hazardous. See 42 U.S.C. § 6921(i)(1). EPA has long defined household waste as non-hazardous. See 40 C.F.R. § 261.4(b)(1) (1991). Thus when a resource recovery facility takes in waste, it is transporting, storing, and treating waste that is either non-hazardous in fact or deemed to be non-hazardous. Indeed, if such a facility directly landfilled rather than incinerated any of the waste taken in, it would not have to manage the waste as a hazardous waste, even without regard to the exemption contained in Section 3001(i).

For this reason, resource recovery facilities do not need, and gain no advantage from, Section 3001(i) before the waste is burned. If Section 3001(i) does not exempt the ash remaining after incineration of household and non-hazardous commercial wastes from Subtitle C regulation, it provides little, if any regulatory relief for resource recovery facilities because it fails to exempt the only part of the process that could conceivably even be covered by Subtitle C. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 763 n.12 (S.D.N.Y. 1989), aff'd 931 F.2d 211 (2d Cir.),

cert. denied, 112 S. Ct. 453 (1991) (if ash is not exempt from regulation as a hazardous waste "it is difficult to understand what, if any, benefit [resource recovery facilities] deriv[e] from the exemption"). Section 3001(i) makes sense only if it exempts the ash residue produced at resource recovery facilities from hazardous waste regulations.

Statutes should be construed in order to avoid unreasonable or absurd results that Congress could not have intended. See, e.g., *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 n.12 (1993); *Rowland v. California Men's Colony*, 113 S. Ct. 716, 720 (1993). Even if the language of Section 3001(i) supported the Seventh Circuit's construction (which it does not, as we explain above), "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). Here, the Seventh Circuit's construction of Section 3001(i) could not more plainly defeat the purpose of the statute—it eliminates any meaningful cost advantage resource recovery facilities might have over waste disposal governed by Subtitle C, and exempts nothing these facilities actually do from the regulation to which they would otherwise be subject. Congress could not have intended Section 3001(i) to be such an empty gesture. Cf. *American Tobacco Co. v. Patterson*, 465 U.S. 63, 69-71 (1982) (Title VII's exemption for seniority systems should not be construed so narrowly as to deprive it of practical utility).

### **C. The Legislative History Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.**

The legislative history of Section 3001(i) confirms what the plain language of the statute demonstrates—that Congress intended to exempt the ash residue of in-

cineration at a resource recovery facility from regulation as a hazardous waste. A Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, leaves no doubt that Congress intended to promote resource recovery by exempting all waste management activities from hazardous waste regulation. The report states:

The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. *It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation.* New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

*All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.*

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). This report demonstrates that Congress

intended to encourage the development and operation of resource recovery facilities by exempting them from Subtitle C regulation, and that the exemption was intended to cover all aspects of waste management at a resource recovery facility, including management of the ash produced at the facility. Disposing of ash pursuant to Subtitle C is a definite impediment to the operation of resource recovery facilities because of the severe impact the regulatory scheme would have on their commercial viability. See page 21, *supra*.

The Seventh Circuit majority refused to rely on this report; the court focussed on the word "generation" and concluded that it should not rely upon a single word in a committee report that did not appear in the statute. Pet. App. 12a. But it is not the word "generation" alone that indicates that ash is exempt from Subtitle C regulation; it is rather the entire context in which the word appears, as the three paragraphs from the report set out above make clear. Moreover, our reliance on the Senate Committee's Report does not involve the selective use of one piece of a legislative history containing many conflicting statements—this report is the sole reference to this issue in the legislative history, and the language and analysis in the report were ultimately adopted by the Conference Committee. See H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5649, 5677. Thus, this report carries special weight as the most authoritative analysis of the legislation that was before Congress. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

The Senate Report, also confirms that Congress intended Section 3001(i) to expand, not severely contract, the existing EPA household waste exclusion. RCRA, as enacted in 1976, did not include an explicit exclusion of household waste from hazardous waste regulation under Subtitle C. Instead, Congress required the EPA to develop and promulgate criteria for identifying hazardous



wastes, see 42 U.S.C. § 6921(a), but noted that hazardous waste regulation "is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 988, 94th Cong. 2d Sess. 16 (1976). Pursuant to this directive, EPA included in its first set of regulations implementing RCRA a provision known as the "Household Waste Exclusion," which provided, in pertinent part, that:

(b) *Solid wastes which are not hazardous wastes.*  
The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g. refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

45 Fed. Reg. 33120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). Like the statute, the regulation did not specifically mention "generation." Despite that omission, EPA unequivocally stated in the preamble that the ash residue from incineration of household waste was excluded from hazardous waste regulation: "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.* at 33099.

When Congress amended RCRA in 1984, it enacted Section 3001(i)—as the provision's title states—to "[c]larify \* \* \* the household waste exclusion," 42 U.S.C. § 6921(i), as it applies to resource recovery facilities. Congress expanded the EPA's regulatory exclusion to apply to resource recovery facilities that burn non-hazardous waste from sources other than households. A

resource recovery facility within the exemption may take in "solid waste from commercial or industrial sources that does not contain hazardous waste," *ibid.*, in addition to household waste. Because EPA's household waste exclusion indisputably covered ash, and Congress's clear objective was to expand the exclusion to include resource recovery facilities that take in non-hazardous commercial waste in addition to household waste, see S. Rep. No. 284, *supra*, at 61, the only conceivable conclusion is that the statutory exemption extends to ash as well. As the district court observed in the opinion adopted by the Second Circuit in the *Wheelabrator* case, "[n]owhere in the 1984 exclusion, nor in the Committee Report which accompanied it, is there any hint of a congressional intent to limit the scope of [the household waste] exclusion." 725 F. Supp. at 765. This Court has repeatedly held that when there is no evidence that Congress intended to repudiate an existing administrative interpretation of a statute when it legislates, Congress is presumed to have approved of that interpretation. See, e.g., *North Haven Board of Education v. Bell*, 456 U.S. 512, 533-35 (1982); *Haig v. Agee*, 453 U.S. 280, 297-98 (1981); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

The Seventh Circuit based its contrary conclusion on the absence of the word "generates" from the list of activities exempt from Subtitle C regulation. Pet. App. 18a-19a. But that term was also absent from the 1980 EPA regulation establishing the household waste exclusion. See 45 Fed. Reg. 33120 (1980). As EPA explained in its preamble, "[s]ince household waste is excluded in all phases of its management," ash resulting from incineration was excluded from Subtitle C regulation. *Id.* at 33099 (emphasis added). Because Congress's objective was to clarify the EPA regulation, it was entirely logical for Congress to use the language employed by the agency and exempt from regulation under Subtitle



C all "management" of the waste received at resource recovery facilities. This is just what Congress did by including in Section 3001(i) that such facilities would not be deemed to be "otherwise managing hazardous wastes for the purposes of regulation" under Subtitle C. 42 U.S.C. § 6921(i). Congress's failure to incorporate a term that did not appear in the EPA regulation is in no way evidence that Congress crafted a narrower exemption. Rather, Congress's decision to track closely the terminology used by the EPA bolsters the conclusion that Congress created an equivalent statutory exemption for resource recovery facilities taking in a range of wastes somewhat broader than those covered by the household waste exclusion.

The difference between Section 3001(i), as the Seventh Circuit interpreted it, and the EPA's household waste exclusion itself demonstrates the absurdity of that court's result. Although household waste may contain some hazardous material, the EPA's household waste exclusion, which EPA explicitly extended to the ash produced when household waste is burned, exempts from Subtitle C regulation the ash produced by an incinerator burning only household waste. If a resource recovery facility operating under Section 3001(i) burns non-hazardous commercial waste in addition to household waste, however, in the Seventh Circuit's view the facility must manage and dispose of its ash pursuant to Subtitle C. There is no reason to require such regulatory burdens simply because a facility accepts non-hazardous commercial waste; that facility does not require Subtitle C regulation any more than a facility that accepts only household waste. See *Wheelabrator*, 725 F. Supp. at 765. Thus, the Seventh Circuit has transformed a statute designed to provide an incentive for resource recovery by relieving facilities that burn household waste and non-hazardous commercial waste from regulatory burdens into one that subjects those facilities to greater regulation and increased costs. That is precisely the opposite of what Congress sought to achieve.

**D. If The Language Of Section 3001(i) Is Ambiguous, This Court Should Defer To The EPA's Interpretation That The Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulations.**

Our reading of the statute is also consistent with the interpretation of the EPA, which is charged with administering the statute and whose views are therefore entitled to deference. In September 1992, the Administrator of the EPA issued a memorandum addressed to all regional administrators setting forth the Agency's decision that under Section 3001(i), the ash produced at a resource recovery facility is exempt from hazardous waste regulations. Pet. App. 41a. Although we believe that the language of Section 3001(i) and the design and purpose of RCRA as a whole plainly support exempting the ash from Subtitle C regulation, if this Court should find the statute ambiguous, it should defer to the EPA's interpretation. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

"Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). If Section 3001(i) is ambiguous, the reasons for deference to administrative interpretations are particularly applicable here. As the Court explained in *Chevron*, the principle of deference to administrative interpretations

has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

467 U.S. at 844 (citations omitted). RCRA is a complex statute with more than one policy goal. Determining the

scope of Section 3001(i), in particular, involves balancing the benefits of promoting resource recovery facilities against the potential harm to the environment if the ash from such facilities is placed in Subtitle D landfills. EPA has exercised its expertise in environmental matters to reconcile these potentially conflicting goals found in the statute. See 42 U.S.C. § 6902. As the Administrator's detailed memorandum explains, human health and the environment will be fully protected if the ash is regulated under Subtitle D, and the development and operation of resource recovery facilities will be promoted by exempting the ash from Subtitle C regulation. Pet. App. 46a-49a. Here, as in *Chevron*, "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865 (citations omitted).

The question, then, is whether the EPA's interpretation of Section 3001(i) is permissible. See *Chevron*, 467 U.S. at 843. An agency's interpretation "need not be the best one by grammatical or any other standards. Rather, [its] interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. The agency's construction of the statute it administers is "permissible" if it "is a construction that is 'rational and consistent with the statute.'" *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987)). "If the agency interpretation is not in

conflict with the plain language of the statute, deference is due." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. at 1401. Accordingly, this Court need find "only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its own judgment for that of EPA." *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). The EPA's memorandum easily meets the test.

First, EPA's construction of Section 3001(i) is rational. The Administrator has analyzed the issue on the basis of the text of the statute and its legislative history, and has considered how best to serve the policies of RCRA. It was eminently rational for EPA to conclude, in light of the enormous costs of disposing of ash pursuant to Subtitle C hazardous waste regulations, that requiring resource recovery facilities to manage and dispose of their ash as a hazardous waste would be a costly impediment that would hinder the development and operation of those facilities. See Pet. App. 47a-49a. EPA also rationally concluded that human health and the environment would be protected if ash were regulated under Subtitle D. This conclusion was based in part upon the new, more stringent criteria EPA had promulgated for municipal solid waste landfills. See Pet. App. 46a-46a. See also 56 Fed. Reg. 50978 (1991).<sup>10</sup> Moreover, EPA can take further action

<sup>10</sup> The EPA's conclusion that disposal of municipal incinerator ash in Subtitle D landfills will protect human health and the environment is consistent with recent studies that show that ash from resource recovery facilities disposed of in a lined monofill (as is the ash in this case) is not hazardous. See Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power, Sept./Oct. 1992 at 18. Before the recent studies, ash had been tested in a laboratory based on the Extraction Procedure and Toxicity Characteristic Leaching Procedure lab tests. *Ibid.* Field tests of ash disposed of in monofills, however, show that the ash in a landfill behaves differently from ash in the laboratory. *Ibid.* The lime used in the scrubber systems of resource recovery incinerators gives the ash a concrete-like character that binds heavy metals, such as lead



to protect health and the environment if necessary. The Administrator noted that if it comes to EPA's attention that municipal waste combustion ash "is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations." Pet. App. 47a.

Second, EPA's construction of the statute is entirely consistent with the statute, as we explain above in Parts I.A. and I.B., since RCRA was plainly intended to encourage the development and operation of resource recovery facilities in order to reduce the volume of solid waste disposed of in landfills and to recover energy from solid waste.

The Seventh Circuit majority refused to defer to the interpretation of Section 3001(i) in the EPA memorandum because the EPA's position had not been consistent. See Pet. App. 2a. The 1992 memorandum, however, set forth EPA's first firm position on the issue of how ash from a resource recovery facility should be regulated. EPA's only prior pronouncement on Section 3001(i), contained in the preamble to its 1985 regulations, was far from a model of clarity—it simultaneously expressed EPA's view that Section 3001(i) did not extend to ash, and its decision not to act on that view. The preamble stated that "EPA does not see in [Section 3001(i)] an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery

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and cadmium, into the ash, so that they are not released into the leachate or the environment. *Id.* at 19-20. Test results show that actual leachate values from ash monofills approximate United States EPA Primary Drinking Water Standards. *Id.* at 20. Moreover, data from one four year study of ash showed that heavy metal concentrations in leachate did not increase, but in fact diminished over time. *Ibid.*

facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28726 (1985). The preamble, however, went on to state that:

EPA does not believe the [Hazardous and Solid Waste Amendments of 1984] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of important technical and policy issues that would be posed in the event serious questions arose about the residue.

*Ibid.* Since municipal waste incinerator ash had not been treated as a hazardous waste under the EPA household waste exclusion, this statement indicated that EPA did not intend to regulate the ash as a hazardous waste.<sup>11</sup> Indeed, EPA has never cited the City for any violation of federal hazardous waste regulations in connection with the Northwest Facility or the handling of the ash at the Northwest Facility. R. 18, ¶ 20. The 1992 EPA memorandum concludes unambiguously that the ash is not subject to regulation as a hazardous waste. It represents EPA's final position on this issue, after what has plainly been a lengthy and careful deliberative process.

Moreover, this Court has rejected the Seventh Circuit's conclusion that an agency's changed position is not entitled to deference. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). In *Chevron* itself, this Court explained that "[a]n initial agency interpretation is not

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<sup>11</sup> The ambiguity and problematic character of the preamble is highlighted by the subsequent congressional testimony (which the court of appeals noted, see Pet. App. 14a-16a) of two EPA officials, who disagreed in significant respects with the preamble and concluded that EPA needed to revisit the issue. In 1992, EPA did just that.



instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. In *Chevron*, EPA had changed its definition of a "stationary source" within the meaning of the Clean Air Act, and the revised interpretation was given full deference. *Ibid*. Particularly in the field of environmental law, where an agency must make difficult judgments about how to balance competing policies, the passage of time may provide an agency with experience and data that warrant revisiting prior decisions.

In addition, an agency's changed interpretation is entitled to "substantial deference \* \* \* if there appears to have been good reason for the change." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989). If an agency's change in position is supported by "reasoned analysis," it will receive judicial deference. *Rust v. Sullivan*, 111 S. Ct. at 1769 (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)). Here, if EPA's position has changed, that change can be attributed in part to EPA's promulgation of stricter criteria for municipal solid waste landfills, as EPA itself acknowledges. See Pet. App. 46a-47a (referring to new rules for Subtitle D landfills found at 40 C.F.R. part 258 and 56 Fed. Reg. 50978 (1991)). These more stringent requirements led EPA to conclude that the ash produced at a resource recovery facility can be safely regulated under Subtitle D. See Pet. App. 46a-47a. This development, which caused EPA to reassess the environmental risks posed if ash is stored in Subtitle D landfills, surely is sufficient reason for a change in its position.

Therefore, if this Court should find that Section 3001(i) is ambiguous, it should defer to EPA's reasonable interpretation of that section to exempt the ash produced at a resource recovery facility from hazardous waste regulations under Subtitle C of RCRA.

## CONCLUSION

For all the above reasons, the judgment below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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THE CITY OF CHICAGO, et al.,

Petitioners

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,

Respondents

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On Writ Of Certiorari To  
The United States Court Of Appeals  
For The Seventh Circuit

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## BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), exempts a resource recovery facility that incinerates municipal solid waste from the requirements of Subtitle C of RCRA applicable to hazardous waste generators when that facility generates an ash residue that would otherwise constitute a hazardous waste under RCRA.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1639

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THE CITY OF CHICAGO, et al.,  
Petitioners

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,  
Respondents

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**On Writ Of Certiorari To  
The United States Court Of Appeals  
For The Seventh Circuit**

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**BRIEF FOR RESPONDENTS**

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**STATUTORY PROVISIONS INVOLVED**

Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), and Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7), of RCRA, are set forth in an appendix to this brief.

**STATEMENT**

Respondents Environmental Defense Fund, Inc. and Citizens For A Better Environment brought this action, asserting that petitioner City of Chicago<sup>1</sup> is violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to

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<sup>1</sup> Petitioners City of Chicago and Richard M. Daley, Mayor of the City of Chicago, are referred to collectively in this submission as "the City."

comply with that Act's Subtitle C hazardous waste requirements in handling the hazardous waste ash residue generated by its operation of a municipal solid waste resource recovery facility. The district court granted the City's motion for summary judgment, agreeing with the City that Section 3001(i) of RCRA exempts the City's resource recovery facility from Subtitle C's requirements applicable to hazardous waste generators. The court of appeals reversed. This Court subsequently granted the City's petition for a writ of certiorari, vacated the judgment below, and remanded the case to the court of appeals for reconsideration in light of the views expressed by the Administrator of the United States Environmental Protection Agency (EPA) in a memorandum to regional administrators dated September 18, 1992. On remand, the court of appeals reinstated its earlier judgment.

1. The City of Chicago owns and operates a municipal solid waste resource recovery facility at which it receives and burns solid waste collected from households and commercial enterprises located throughout the City. The resource recovery facility receives 200 to 250 truckloads of refuse each day, totalling 350,000 tons of waste per year. The facility in turn generates 110,000 to 140,000 tons of ash, the toxicity of which is routinely high enough to qualify it as a "hazardous waste" as defined by regulations implementing Subtitle C of RCRA. Between 1981 and 1987, 32 out of 35 samples of ash tested exhibited sufficiently high leachable concentrations of lead, cadmium, or both to be classified a hazardous waste under established EPA testing procedures for the identification of hazardous wastes based on their "toxicity characteristic." Pet. App. 6a. The "toxicity characteristic" measures a waste's potential to leach specified contaminants into the environment above threshold levels deemed hazardous by EPA. Whether a particular waste is hazardous turns therefore on at least two factors: the chemical makeup of the compound and its physical characteristics.<sup>2</sup>

<sup>2</sup> At the time EDF commenced this litigation, EPA utilized a process called the "Extraction Procedure" or "EP toxicity test" to determine which wastes exhibit the characteristic of toxicity. EPA currently uses a different process called the "toxicity characteristic

The City, however, has not in the past, and does not currently comply with Subtitle C in transporting, storing, or disposing of the hazardous ash. Pet. App. 6a-7a. The City has not, as is required of generators of hazardous waste, applied for and received an EPA identification number prior to engaging in any of these regulated activities. See 40 C.F.R. 262.12. The City likewise does not purport to comply with packaging, labelling, or container requirements applicable to hazardous wastes. See 40 C.F.R. 262.30-33.

Nor has either the waste hauler hired by the City to transport the hazardous ash,<sup>3</sup> or any of the facilities where the ash has been ultimately disposed, met the requirements for Subtitle C transporters or disposal facilities. Until 1987, the City sent its ash to a former limestone quarry, which was not permitted to accept hazardous wastes. R.12 at ¶16. The City also sent the ash to a sanitary landfill in Michigan that failed to comply with the basic design elements of hazardous waste landfills. R.34 at ¶ 24. Among other shortcomings, there was no double liner or double leachate collection system, which are required in licensed hazardous waste landfills to guard against the migration of hazardous constituents into any nearby groundwater supplies. *Id.*; see 42 U.S.C. 6924(o).

2. On January 27, 1988, respondents filed a complaint against the City, alleging that the City was violating Subtitle C of RCRA in its handling of hazardous ash generated at the City municipal solid waste resource recovery facility. The City filed a motion for summary judgment on the ground that RCRA Section 3001(i) exempts from Subtitle C regulation both municipal solid waste and the ash generated from its combustion by a resource recovery facility. The City did not contest respondents' claim that the concentrations of hazardous constituents in the ash would otherwise

leaching procedure" or "TCLP" to make this determination. See 40 C.F.R. 261.24(a).

<sup>3</sup> See R.68 at Response 12 ("R.68" refers to item number "68" in the record below).

render it a "hazardous waste" within the meaning of RCRA. Nor did the City contest respondents' assertion that the City was not complying with RCRA's Subtitle C requirements. Pet. App. 6a-7a, 23a-24a. The district court granted the City's motion for summary judgment. Pet. App. 33a. The court concluded that Section 3001(i) exempts hazardous ash that the City's facility generates from Subtitle C.

3. The court of appeals reversed. Pet. App. 5a-21a. Looking to "what the statute actually says," the court of appeals found dispositive that "Section 3001(i) mentions 'the treatment, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among those activities *generating* a different waste product." *Id.* at 18a (emphasis in original). "It does not follow," the court reasoned, "that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.* The court also stressed that hazardous waste "generation" is excluded from the statutory definition of "management." *Id.* Judge Ripple dissented. *Id.* at 21a.

4. On February 18, 1992, the City of Chicago petitioned (No. 91-1328) for a writ of certiorari. Respondents responded by agreeing that the writ should be granted, but that the judgment of the court of appeals should be affirmed. At this Court's invitation (112 S. Ct. 1932), the Solicitor General filed a brief recommending that the Court grant the petition, vacate the judgment below, and remand for reconsideration in light of a memorandum dated September 18, 1992, which the EPA Administrator distributed to regional EPA offices, that supported the City's position. See Pet. App. 41a-49a. The Court remanded for reconsideration in light of EPA's memorandum. 113 S. Ct. 486 (1992).

5. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-4a. According to the court, the "plain

language of the statute is dispositive." *Id.* at 3a. Judge Ripple dissented. *Id.* at 3a-4a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Much about this case is undisputed. The City does not here dispute that the ash that the City's municipal waste incinerator generates is hazardous under EPA's standard testing procedures. There is likewise no dispute that Congress concluded that protection of human health and the environment requires that hazardous wastes be handled only pursuant to RCRA's strict Subtitle C requirements. Nor is there any disagreement regarding the fact that the City's ash, despite its hazardousness, is not being handled in this manner.

This case presents the question whether RCRA Section 3001(i) allows this to occur. Like the court of appeals below, we think not. We do not question the City's claim that Congress intended to promote resource recovery facilities. But, as the appellate court concluded (Pet. App. 20a), it would seem "unlikely," if not entirely "absurd," to suppose "that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills."

1. In support, we need go no further than the plain language of the statute, which makes clear that Congress never enacted such a far reaching exemption from the scope of RCRA's rigorous regulation of hazardous waste. Congress instead conferred a regulatory exemption on the City's resource recovery facility that, while quite generous, did not abandon RCRA's environmental protection and waste minimization objectives. Congress exempted the incineration process itself from Subtitle C regulation by providing that the receipt and burning of municipal solid waste shall not be considered the management of hazardous waste, notwithstanding the fact that household waste routinely includes hazardous materials. This exemption relieves the City of many of Subtitle C's most rigorous requirements.



The plain language of Section 3001(i), however, does not exempt from Subtitle C the ash that the City's facility generates. Entirely missing from the statutory language is any suggestion that Section 3001(i) exempts the City's facility as a "generator" of hazardous waste, which is a distinctly regulated activity under RCRA Subtitle C. Nor is there any support for the City's contention that Section 3001(i) exempts those downstream entities that subsequently manage that ash if hazardous. Indeed, Section 3001(i) never even mentions those facilities.

2. The City's proposed construction of Section 3001(i) also cannot be squared with the structure and purpose of RCRA. The environmental and human health costs of extending the legal fiction of nonhazardousness to the ash generated by the City would be enormous. Contrary to the City's claim, RCRA is not a statute that generally exempts resource recovery facilities from Subtitle C regulation. Such facilities are routinely regulated under Subtitle C when they manage hazardous wastes. Congress subordinated the promotion of resource recovery to environmental protection and described its purpose as promoting resource recovery "which preserve[s] and enhance[s] the quality of air, water, and land resources." 42 U.S.C. 6902(a)(10).

3. The relevant legislative history is likewise unavailing to the City. The sharp contrast between the actual statutory language and that contained in a legislative report on which the City relies--the latter purports to add a critical term not present in the statute--only underscores the weakness of the City's argument. Although legislative history may sometimes be relevant to determining the meaning of ambiguous statutory language, it most certainly may not have the practical effect of adding language plainly not in the statute itself.

4. Because, moreover, congressional intent is clear, there is no statutory gap for the agency to fill and EPA's opposing view of the meaning of the statute is entitled to no deference. In addition, the way in which EPA announced its regulatory conversion--rejecting its prior view that Section 3001(i) does not exempt hazardous ash from Subtitle C--renders any judicial deference

inappropriate. EPA's new view is not the result of an exercise of legislatively delegated lawmaking authority, which would be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It is not the product of the kind of reasoned decisionmaking process required for legislative rulemaking by the Administrative Procedure Act. Its sole official expression is an internal agency memorandum issued without the safeguards, including public input, that underlie the rationale for judicial deference.

5. Finally, contrary to the City's exaggerated claims, affirming the judgment of the court below will not mean that all municipal incinerator ash is hazardous waste and therefore must automatically be subject to Subtitle C. It simply means that those who generate ash, like generators of other kinds of potentially hazardous waste, must test that waste for its hazardous characteristics and subsequently handle any portion of the ash that is hazardous consistent with Subtitle C. It also means that municipalities will likely take further steps to promote RCRA's primary objectives -- source reduction and waste minimization -- in order to reduce incinerator intake of those constituents that cause the ash residue to be hazardous.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF RCRA DOES NOT EXEMPT HAZARDOUS ASH GENERATED BY A MUNICIPAL SOLID WASTE RESOURCE RECOVERY FACILITY FROM SUBTITLE C REGULATION

A. This case presents a pure question of statutory construction. "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 113 S.Ct. 2151, 2157 (1993), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In ascertaining whether there is such a "plain meaning," this Court "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.*

*v. Cartier*, 486 U.S. 281, 291 (1988); *National RR. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

The Court may also consider any relevant judicial canons of statutory construction in determining whether the meaning of the statutory language is sufficiently plain to give it controlling weight. See, e.g., *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring). Of particular relevance to this case is the established canon that "[a]ny exemption from such humanitarian and remedial legislation must \* \* \* be narrowly construed, giving due regard to the plain meaning of the statutory language." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945); see *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) ("usually read the exception narrowly in order to preserve the primary operation of the provision"). As the Court explained, the canon's rationale is that "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." 324 U.S. at 493.

In this case, the plain language of RCRA creates no exception from Subtitle C for hazardous ash generated from the combustion of household wastes and nonhazardous commercial and industrial wastes. Section 3001(i) provides that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter \* \* \*." The provision goes on to define what it means by "municipal solid waste" by providing that the facility can "receive[ ] and burn[ ] only (i) household waste \* \* \*, and (ii) solid waste from commercial or industrial sources that does not contain hazardous waste \* \* \*." Finally, Section 3001(i) includes certain safeguards against the facility receiving and burning hazardous wastes. The exemption applies only if the facility "does not accept hazardous wastes" and, to that end, requires that "the owner or operator of such facility has established contractual requirements or other appropriate notification or

inspection procedures to assure that hazardous wastes are not received at or burned in such facility."

The plain meaning of this language is that the "municipal solid waste" that the incinerator receives and burns shall not be considered a "hazardous waste" if the City recovers energy from the process and follows certain procedural safeguards. The legal effect of such a legislative determination is, as the statute expressly provides, that a municipal incinerator's receiving and burning of municipal waste "shall not be deemed to be treating, storing, or disposing of, or otherwise managing hazardous wastes" within the meaning of Subtitle C.

In this case, therefore, the City cannot be considered a treatment, storage, or disposal ("TSD") facility subject to the strict permitting requirements set forth in RCRA Subtitle C and in EPA's implementing regulations. Section 3001(i) exempts the City's resource recovery facility from those requirements, notwithstanding its receipt and burning of household waste that, as the City correctly acknowledges (Br. 4), "sometimes contains some components that qualify as hazardous waste under the federal scheme."

Significantly, at the time Congress enacted Section 3001(i) in 1984, there was no explicit statutory language in RCRA allowing for any household waste exclusion.<sup>4</sup> In addition, EPA's then-existing regulation excluding household waste from Subtitle C regulation did not extend to a resource recovery facility that mixed household wastes with nonhazardous commercial and industrial waste. However, to be economical, those facilities needed the volume of waste supplied by those additional sources. Facility operators also harbored a very real concern that their inadvertent receipt of hazardous waste would cause a municipal incinerator to be deemed a hazardous waste treatment, storage, or disposal facility. See 50 Fed. Reg. 28726 (1985).

<sup>4</sup> The exclusive support for that regulatory exclusion was language contained in a legislative report accompanying RCRA in 1976. See S. Rep. 94-988, 94th Cong., 2d Sess. 16 (1976).



Section 3001(i) addressed these concerns. It allowed a household waste exclusion in the resource recovery context. It also allowed a resource recovery facility to mix household wastes with nonhazardous wastes from other sources. And Section 3001(i) conditioned the exemption on the owner or operator of the facility establishing "appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility," rather than on an absolute guarantee from the facility that no hazardous wastes had in fact been received or burned.

Contrary to the City's contention (Br. 22, 23), such an exemption is hardly so "implausibly narrow" as to amount to an "empty gesture." The most rigorous, far-reaching, and costly aspects of RCRA's Subtitle C are its requirements applicable to TSD facilities. As described by one commentator, "[a]ny person engaged in the treatment, storage, or disposal of any hazardous waste \* \* \* is subject to the very strict, complex, and expensive regulatory requirements of RCRA. \* \* \* The full brunt of EPA's enforcement efforts under RCRA tends to be focused on the owners and operators of TSD facilities \* \* \*." Michael Gerrard, 3 Environmental Law Practice Guide §29.05[1], p. 29-52 (1992).

Perhaps most significantly, by virtue of their not being considered TSD facilities, municipal waste incinerators are not subject to corrective action and closure, and financial assurance requirements, which are likely the most expensive and far-reaching regulatory requirements added by HSWA.<sup>5</sup> A successful TSD

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<sup>5</sup> Subtitle C's TSD requirements are set forth in RCRA at 42 U.S.C. 6924 and in EPA's implementing regulations at 40 C.F.R. Pts 264, 265, and 270. Corrective action requires all TSD permittees to clean up all solid waste management units located on the same facility, regardless of when the units were created or closed. 42 U.S.C. 6924(u),(v). "This corrective action requirement is one of the major reasons that generators and transporters work diligently to manage their wastes so as to avoid the need to obtain a \* \* \* TSD permit." Gerrard, § 29.06[3][d] p. 29-69. EPA estimates the total national cost of complying with corrective action as between 7 and

permitting process takes an average of four and one-half years to complete and, in light of the rigorous regulatory requirements, many applications are not successful. See USEPA Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study*, 49-50 (1990). Thus, rather than being "implausibly narrow" (Pet. Br. 22), the plain meaning of Section 3001(i) confers a substantial and generous regulatory exemption on the City's incinerator.

B. The City, however, proposes a far more expansive view of Section 3001(i). It contends that the plain meaning of Section 3001(i) goes further than to dictate the circumstances when municipal solid waste shall not be considered hazardous waste. According to the City, the language of Section 3001(i) unambiguously expresses the additional congressional intent that the ash produced from the incineration process shall not be considered a "hazardous waste" within the meaning of RCRA even where, as is not contested by the City here, that ash exhibits one of the EPA-defined characteristics of a hazardous waste. Based on this reasoning, the City asserts that it cannot be considered to be managing a hazardous waste when it manages the ash. And, taking its position to its logical extreme, the City further contends that those entities with whom the City arranges to transport, treat, store, dispose, or reuse the hazardous ash are likewise exempt from Subtitle C.

The plain language of Section 3001(i), however, admits of no such possible construction. The ash produced by the incinerator is nowhere mentioned in the provision. The only waste that is the subject of the exemption is the municipal solid waste that the

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42 billion dollars. 55 Fed. Reg. 30798, 30861 (1990). Closure provisions require that the TSD facility "clean close" by removing all wastes (40 C.F.R. 264.351); and financial assurance regulations are intended to ensure that each TSD owner or operator will actually have the financial resources necessary for closure and for liability for sudden accidental occurrences (40 C.F.R. 264.143, 264.147(a)).



incinerator receives and burns. The statute does not purport to address the status of the ash that is produced from incineration.

In particular, missing from the statutory language is any suggestion that the facility shall not be deemed to be "generating" a hazardous waste in the event that the ash produced contains high levels of hazardous constituents in a leachable form. Nor is there any suggestion in the statutory language that those downstream regulated entities who subsequently transport, treat, store, and dispose of the hazardous ash are not "managing" hazardous waste, within the meaning of RCRA. Indeed, Section 3001(i) never even mentions those downstream from the municipal waste facility.

The City advances (Br. 14-17) several textual arguments to support its insistence that the plain language supports its view. We address each in turn below. None is persuasive.

1. First, there is no merit to petitioners' claim that the reference in Section 3001(i) to "otherwise managing" extends to "generating" a hazardous waste. In RCRA, Congress carefully and precisely defined the terms "management" and "generation" in a manner that provides, as the court of appeals explained, for "no overlap whatsoever" (Pet. App. 19a). RCRA defines "hazardous waste generation" as "the act or process of producing hazardous waste." 42 U.S.C. 6903(6). "Hazardous waste management" is defined as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. 6903(7).<sup>6</sup> Hence, "otherwise managing" in Section 3001(i) refers to those specific management activities not "otherwise" expressly listed in

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<sup>6</sup> The distinction between generation of hazardous waste and the management of hazardous waste, including its disposal, is further revealed in RCRA's detailed statutory scheme, which sets out separate and exclusive regulatory schemes for these various activities. Compare 42 U.S.C. 6922 (generators) with 42 U.S.C. 6923 (transporters) and 42 U.S.C. 6924 (TSD facilities); and compare 40 C.F.R. Pt 262 (generators) with Part 263 (transporters) and Parts 264-265 (TSD).

the provision. These include "collection," "source separation," "transportation," "processing," and "recovery." By clear statutory definition, "otherwise managing" does not include "generation."

2. Likewise lacking merit is the City's contention (Br. 15) that the word "disposing" in Section 3001(i) denotes clear congressional intent to exempt hazardous ash from the requirements of Subtitle C. Otherwise, the City argues (Br. 22), the word "disposal" would have no meaning because the hazardous ash is the only substance that the resource recovery facility is disposing. This is simply not so. The plain meaning of this clause is that the incinerator shall not be deemed to be "disposing" of hazardous waste either when it burns municipal waste that it receives or when it disposes of (or, more likely arranges for the disposal of) municipal solid waste that the incinerator receives, but does not burn.

The City's facility engages in two distinct activities that, absent Section 3001(i), might have been deemed "disposing" of hazardous waste. First, there is the burning process itself, during which the municipal solid waste is incinerated. Section 3001(i) makes plain that the incineration process does not constitute the disposal of hazardous wastes, notwithstanding the fact that the facility is destroying some of the hazardous constituents known to be in household wastes.

Second, there is the City's disposal of the waste that the facility receives, but does not burn. The source of the City's error in this regard lies in its failure to consider that municipal waste incinerators decline to burn approximately 30 percent of the municipal solid waste they receive.<sup>7</sup> The incinerator is therefore

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<sup>7</sup> Significant amounts of waste received at a resource recovery facility typically must be disposed of directly, rather than being incinerated. These wastes include (a) unprocessable wastes; and (b) bypass wastes, such as wastes received in excess of capacity during peak generation times or during incinerator shutdowns for repairs. These wastes constitute approximately 30 percent of the waste that the municipal incinerator receives. Municipal Incinerators: Fifty

obliged to arrange for the disposal of substantial amounts of municipal solid waste. The clear advantage of Section 3001(i) in this respect is that it provides that the incinerator's disposing of such municipal waste will not trigger Subtitle C.

It is therefore simply not true that the word "disposing" in Section 3001(i) must apply to the ash generated by the incinerator to have any meaning. "Disposing" has great significance when applied to the sole waste referred to by Section 3001(i), which is the "municipal solid waste" that the incinerator receives and burns.

3. The City also argues (Br. 14-15) that the City cannot be considered a "generator" of hazardous waste because it is burning material that is already a waste. A variant of this argument is that the City is simply "treating" waste and the statutory exception clearly applies to the treatment of hazardous waste. See Pet. Br. 17. In each instance, we agree with the premise but dispute the conclusion.

Petitioners mistakenly assume that because the *treatment* of one kind of waste may result in the *generation* of another kind of hazardous waste, a statutory exemption applicable to the former activity must extend to the latter as well. The short answer is that such an assumption is improper where the two activities trigger distinct statutory requirements directed to different kinds of risks. See note 6, *supra*. Notions of proximate cause simply do not trump clear statutory definitions. Compare 42 U.S.C. 6903(6) (defining "hazardous waste generation") with 42 U.S.C. 6903(34) (defining "treatment").

Equally unpersuasive is the City's related, curious claim (Pet. Br. 17) that one cannot "generate" hazardous waste from materials that themselves constitute solid waste. RCRA's clear statutory definitions, however, show otherwise. The term "generator" is not defined by statute, but "hazardous waste generation" is, and it "means the act or process of producing hazardous waste." 42

U.S.C. 6903(6). Contrary to the City's reasoning, there is no exception for an "act or process of producing hazardous waste" when the process involves waste in the first instance. The sole inquiry is whether hazardous waste is produced.

Indeed, were the rule otherwise, any kind of facility that treated waste would be exempt from the Subtitle C generator regulations even when that treatment produced a residue that itself qualified as a hazardous waste. For instance, an incinerator that burned industrial waste for the sole purpose of its destruction (recovering no energy) would not be subjected to the requirements applicable to a generator of hazardous waste when the incinerator subsequently arranged for another entity to transport, treat, store, or dispose of the waste. See 40 C.F.R. Pt 262. The facility would be free of RCRA's requirement that all hazardous wastes be accompanied by a manifest as well as of the obligation to ensure that the waste was disposed of at a permitted TSD facility. 40 C.F.R. 262.20(a). Not surprisingly, the statutory language provides no hint of such a massive loophole to Subtitle C. And, EPA's regulations expressly deny the existence of such a blanket exemption by providing that "any solid waste *generated* from the treatment \* \* \* of a hazardous waste, including any \* \* \* ash \* \* \* is a hazardous waste." See 40 C.F.R. 261.3(c)(2)(i) (emphasis added); see also 40 C.F.R. 262.10(f) ("An owner or operator who initiates a shipment of hazardous waste from a treatment, storage, or disposal facility must comply with the generator standards established in this part.").

Nor, contrary to the City's intimation, does it make a difference that the chemical constituents that make the ash hazardous originate in the waste processed by the incinerator. To be sure, metals such as cadmium and lead are chemical elements and therefore cannot be created or destroyed by the incineration process. But what the City wrongly assumes from that premise is that the ash produced by incineration is therefore a mere subset of the combusted waste. In fact, the two wastes are completely different. The waste stream is physically and chemically transformed during the combustion process. Wholly apart from



the household waste exclusion, the combustion of nonhazardous waste can routinely create a hazardous waste-ash residue.

As described above (see page 2, *supra*), it is the concentration of hazardous constituents and their susceptibility to leaching in their current physical state that determine whether a given waste is considered "hazardous" under EPA's toxicity characteristic. In the case of incinerator ash, what makes the ash hazardous is the way in which the incineration process dramatically increases the concentration of hazardous constituents and, by placing them on a substance (ash) with a disproportionately high degree of surface area, makes those higher concentration levels far more susceptible to leaching. See R.34 at ¶¶ 10, 17. Simply put, the physical makeup of the hazardous waste produced or generated by incineration is dramatically different from the waste that is combusted. The combustion of nonhazardous waste may, therefore, produce (*i.e.*, generate) an ash that constitutes a hazardous waste.

4. The City's final textual argument for its proffered interpretation is a variant on its general theme that inclusion of the word "generating" is not necessary for Section 3001(i) to exempt ash that fails the toxicity characteristic test. The City contends (Br. 16) that "generating" is not necessary because Section 3001(i) provides that a municipal incinerator shall not be deemed to be managing hazardous waste, which is ultimately what EDF contends, and the court of appeals held, that the City is doing. The City's argument is fatally flawed in several respects.

a. First, the City's argument takes the deeming clause of Section 3001(i) wholly out of context. The only waste to which that clause applies is the sole waste expressly mentioned in Section 3001(i): the "municipal solid waste" that is being received and burned. We agree that the City's management of that waste cannot be considered managing "hazardous waste." That is, after all, what the statute plainly says. But what the statute plainly does not say is that the same exemption applies to the Subtitle C requirements applicable to a generator of a new and very different

waste -- ash -- that would otherwise constitute a hazardous waste under RCRA.

b. Second, the City's management of the hazardous ash is not, in any event, the sole focus of the City's legal argument. The City asks the Court to conclude that the plain meaning of Section 3001(i) is that neither the City nor those entities which *subsequently* transport, treat, store, dispose, or reuse the hazardous ash are managing a hazardous waste even when that ash fails EPA's toxicity characteristic analysis. There is simply no basis in the plain language of Section 3001(i), however, to conclude that such a downstream or "waste stream" exemption exists. Those downstream entities are never mentioned. The "resource recovery facility recovering energy from the mass burning of municipal solid waste" is the only entity mentioned in Section 3001(i) that "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter." 42 U.S.C. 6921(i). There is no parallel exemption for any other entity that is subsequently "treating, storing, disposing of, or otherwise managing" the hazardous ash.

c. Indeed, that is the very reason why the City is mistaken in contending that the omission of the word "generating" from Section 3001(i) is meaningless because, the City argues, it is unnecessary to their argument. The word "generating" is, as a practical matter, absolutely essential to the City's position and therefore its absence is fatal to the City's claim. What the City is seeking to avoid in this case is paying landfill disposal operators the higher costs of disposing of hazardous ash in a Subtitle C landfill. Whether those costs are incurred in this case does not depend so much on whether the City is managing hazardous waste as it does on whether those disposal facilities are managing hazardous waste. For, if they are, those disposal facilities will charge the City accordingly. But, without the word "generating" in Section 3001(i), there is not even the barest support in the plain meaning of Section 3001(i) for such a downstream exemption.



Any possible doubt in this regard is eliminated by comparing the language of Section 3001(i) to the language of a different provision of RCRA, which shows that Congress knew how to draft a waste stream exemption in RCRA when it wanted to. It also demonstrates that Congress knew how to include the word "generating" -- the precise word missing from Section 3001(i) -- to create such a waste stream exemption. Congress provided in its note to 42 U.S.C. 6921 that an "owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating*, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of" Subtitle C. See 42 U.S.C. 6921 note (emphasis added), added by Pub. L. No. 99-499, Title I, § 124(b), 100 Stat. 1689 (1986). Congress included the precise term of art missing from Section 3001(i).<sup>8</sup>

d. The absence of any plain language support for a downstream exemption supplies yet another reason for rejecting the City's assertion that Section 3001(i) applies to the City's generation of the ash. A regulatory scheme in which the City is relieved of its Subtitle C responsibilities as a generator of hazardous waste, but downstream entities transporting, treating, storing, and disposing of that ash are not, would be completely unworkable. A TSD facility, for instance, would be responsible for complying with Subtitle C in its management of the ash when hazardous, but

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<sup>8</sup> Significantly, however, even in declaring such a downstream exemption, Congress took care to limit its reach to avoid the very kinds of adverse environmental effects that the City nonetheless claims are permitted by Section 3001(i). Congress added to 42 U.S.C. 6921 note the caveat that if any of the resulting material "meets any of the characteristics identified under Section 3001 of subtitle C \* \* \*, the preceding sentence shall not apply and such \* \* \* waste material shall be deemed a hazardous waste \* \* \* and shall be regulated accordingly." In other words, Congress limited the application of the downstream exemption when necessary to ensure that a waste that was in fact hazardous would be managed accordingly. In this case, Congress did not even create a downstream exemption in the first instance, so Congress' careful drafting of 42 U.S.C. 6921 note is doubly fatal to the City's argument.

the generator would never have performed the threshold identification and manifest procedures that are essential to the success of the regulatory program. See 42 U.S.C. 6922(a)(5). That is simply nonsensical. How would a transporter know that it was receiving a hazardous waste if the Subtitle C manifest system requirements did not apply to the generator of the waste in the first place?

But that is the very reason why it is wrong to suppose that Congress intended to extend the exemption to the generation of ash at all. Congress would not have exempted the resource recovery facility from complying with the Subtitle C requirements applicable to a generator of hazardous waste without likewise exempting those downstream by creating a waste stream exemption. And, because Congress plainly did not do the latter in Section 3001(i), the City's tortured construction that Congress did the former should likewise be rejected.

## II. RCRA'S OBJECT AND STRUCTURE ARE CONSISTENT WITH THE VIEW THAT SECTION 3001(i) DOES NOT EXEMPT HAZARDOUS ASH FROM SUBTITLE C

"[T]he object and structure of the Act as a whole" likewise support the view that Section 3001(i) does not provide a wholesale exemption from Subtitle C for municipal incinerator ash. *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990). Congress announced two national policies in RCRA: "the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible" and "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). Our view that the plain language of Section 3001(i) does not exempt the City's ash, when hazardous, from Subtitle C regulation is consistent with both these purposes.

By contrast, the City's reading would make a mockery of Congress' effort in RCRA to protect human health and the environment and to minimize the generation of hazardous waste. The City's claim that its view is nonetheless consistent with

RCRA's purposes both misreads the extent of Congress' desire in RCRA to promote resource recovery and misapprehends the relationship of that resource recovery goal to municipal solid waste incineration.

A. When Congress enacted RCRA in 1976, it sought to "eliminate the last remaining loophole in environmental law" by creating a comprehensive "cradle to grave" federal program for the management of hazardous waste to protect human health and the environment. H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 4,5 (1976); see *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2011 n.1 (1992). In RCRA Subtitle C, Congress required EPA to create a regulatory program applicable to the generation, transportation, treatment, storage, and disposal of hazardous waste. Congress conferred on EPA great discretion in determining the substance of those rules. EPA's sole mandate was to establish standards "as may be necessary to protect human health and the environment." Pub. L. No. 94-580, §§ 3002-3004, 90 Stat. 2806-2808 (1976).

When Congress enacted the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, 98 Stat. 3221 (1984), which substantially amended RCRA, Congress adopted a very different approach to the problem and to EPA. HSWA grew out of congressional disappointment with EPA's implementation of the 1976 RCRA law. S. Rep. No. 98-284, 98th Cong., 1st Sess. 2-4 (1983); H.R. Rep. No. 98-198, 98th Cong., 2d Sess. Pt. 1, 20 (1983); H.R. Rep. No. 97-570, 97th Cong., 1st Sess. 10 (1982). Congress sought to correct "serious gaps in RCRA's current regulatory systems" (H.R. Rep. No. 98-198, at 20) or, as described by EPA, to "close the loopholes in the types of wastes and waste management facilities not covered under RCRA" (USEPA Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads*, 7 (1990)).

Hence, "Congress broadened the scope of the statute and tightened the regulatory restraints in 1984." *MidAtlantic National Bank v. New Jersey Department of Environmental Protection*, 474

U.S. 494, 506 (1986). Congress lowered the threshold for the small quantity generator exemption from 1000 kg to 100 kg of hazardous wastes per month (42 U.S.C. 6921(d)) and tightened up the process for delisting a waste as hazardous (42 U.S.C. 6921(f)). Congress required EPA to list more wastes as hazardous, add hazardous characteristics, and strengthen agency testing procedures (42 U.S.C. 6921(e), (f), and (g)). Congress also banned altogether the land disposal of certain wastes and allowed the land disposal of other wastes only if EPA promulgated within a prescribed time period predisposal treatment standards to reduce hazardousness (42 U.S.C. 6924(d)-(h)). Finally, Congress mandated that hazardous waste landfills meet certain minimum technological requirements, including double liners, leachate collection systems, and monitoring wells (42 U.S.C. 6924(o)).

Congress understood, and specifically found in HSWA, that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment." 42 U.S.C. 6902(b)(5). The entire thrust of the amendments was therefore toward increased stringency, closing loopholes, speeding implementation, and assuring the proper handling and disposal of hazardous wastes. HSWA reflects Congress' "undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances." *MidAtlantic National Bank*, 474 U.S. at 506.

It would be altogether incongruous for the Congress so concerned with the integrity of Subtitle C as to impose its requirements on dry cleaners and other small quantity generators producing a mere 100 kg of hazardous waste a month, simultaneously to create a wholesale exclusion for the hazardous wastes that municipal resource recovery facilities generate.<sup>9</sup> It

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<sup>9</sup> The approximately 175,000 generators of 100 to 1000 kilograms of hazardous waste per month that Congress placed under Subtitle C in 1984 generate an estimated 760,000 tons of hazardous waste per year. See USEPA, *National Small Quantity Hazardous Waste Generator Survey*, 30-31 (Feb. 1985). By contrast, municipal resource recovery facilities generate approximately 8.5 million tons



would likewise be incongruous for that same Congress, which was so concerned about the dangers presented by the land disposal of hazardous wastes that it mandated predisposal treatment and minimum technological requirements for landfills, to allow the City to evade such treatment and technological requirements in disposing of its hazardous ash on land.

Such a reading of RCRA Section 3001(i) would also fly squarely in the face of Congress' related concern in enacting HSWA to avoid creating more abandoned and inactive hazardous waste sites requiring the enormous expenditure of cleanup monies under the federal Superfund law. See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* Congress included in HSWA the specific finding that "if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming." 42 U.S.C. 6901(b)(6). Congress understood that if the regulatory gaps were not closed, "little more will be done than to contribute to future burdens on the 'Superfund' program." H.R. Rep. No. 98-198, 98th Cong., 1st Sess. Pt. 1, 20 (1983).<sup>10</sup>

It is no mere legal technicality that the City's incinerator ash fails EPA's toxicity characteristic analysis. That determination,

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of ash per year. See *Amici Br. Barron County, WI, et al.* 6.

<sup>10</sup> Because the City would itself be a liable party under CERCLA for the huge cost of cleaning up any Superfund sites resulting from ash contamination, it is hard to imagine that Congress would have created such an exemption even if it wished to reduce the regulatory burden on municipalities. A waste that is not considered hazardous under RCRA only because of that Act's household waste exclusion nonetheless constitutes a "hazardous substance" within the meaning of CERCLA, 42 U.S.C. 9601(14). See, e.g., *B.F. Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992); *Anderson v. Minnetonka*, 1993 U.S. Dist. Lexis 4846 (D. Minn. 1993); *State of New Jersey v. Gloucester*, 821 F. Supp. 999 (D. N.J. 1993). That is certainly EPA's position. See 57 Fed. Reg. 51701 (1989).

which the City does not here dispute, is based on the high concentration of heavy metals on the ash, and the susceptibility of those metals when concentrated on the surface of ash-like material to leach out of landfills.<sup>11</sup> The release of these high concentrations of heavy metals, moreover, presents very real and significant human health and environmental risks. Lead, for example, "is the number one environmental poison for children. Lead is a poison that affects virtually every system in the body." *Lead Poisoning, Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 25 (1991) (testimony of Vernon Houk, Director, U.S. Center for Disease Control); see USEPA, *Strategy for Reducing Lead Exposure*, 1 (1991) ("Lead is a highly toxic metal,

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<sup>11</sup> The City (Pet. Br. 31 n.10) and virtually all of its supporting amici rely on a recent study to support their claim that the ash generated by an incinerator that utilizes a scrubber is less hazardous because "[t]he lime used in the scrubber systems \* \* \* gives the ash a concrete-like character that binds heavy metals, such as lead and cadmium, into the ash, so that they are not released into the leachate or the environment." Even accepting the validity of that claim (which a more recent EPA study would seem to question (see David Kosson, Teresa Kosson, & Hans van der Sloot, *Evaluation of Solidification/Stabilization Treatment Processes for Municipal Waste Combustion Residues*, 127, 129, 150 (USEPA Risk Reduction Engineering Laboratory, 1993) (No. CR 818178-01-0)), what the City conveniently ignores is that not all municipal waste resource recovery facilities use scrubbers. Indeed, the City's own facility does not apparently have such a scrubber, but utilizes only electrostatic precipitators. See R.19 Ex. I (brochure describing City facility); *The 1992 Municipal Waste Combustion Guide*, WASTE AGE, 99, 104-105 (Nov. 1992). It ill behooves the City to rely on a technology that not only is not required, but that the City reportedly is not even using. In any event, even if the City were correct, the absence of hazardousness might simply mean that the ash would not fail the EPA toxicity characteristic analysis in the first instance.



producing a range of adverse health effects, particularly in children and fetuses."').<sup>12</sup>

For this reason, the various claims made by amici supporting the City regarding the potential beneficial reuses of hazardous ash (e.g., road construction, cement manufacturing) are especially misguided. See, e.g., Amicus Br. National League of Cities 5-6; Amicus Br. Barron County, Wisconsin 18. It is precisely those kinds of reuses, which are not subject to any regulatory oversight under Subtitle D, that may present the greatest potential hazards. Because ash utilization (e.g., in road building or other construction activities) allows the placing of hazardous ash or hazardous ash-derived products into the general environment, rather than into a controlled disposal environment, it implicates potential exposure pathways that extend far beyond those from ash disposal, both in magnitude and duration.<sup>13</sup>

Indeed, much of RCRA Subtitle C and EPA's implementing regulations are specifically designed to guard against the dangers that the unrestricted reuse of hazardous wastes present. Congress, in Subtitle C, specifically singled out for express prohibition the use of hazardous waste "for dust suppression or road treatment." See 42 U.S.C. 6924(l). And, consistent with congressional intent

<sup>12</sup> As described, *infra*, at pages 47-49, there is no merit to the City's apparent assumption (Br. 34) that EPA's new Subtitle D regulations applicable to municipal waste landfills will guard against those risks. See 40 C.F.R. Pt 258.

<sup>13</sup> See *Resource Conservation and Recovery Act Amendments of 1991, Hearings Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess., Pt. 2, 235 (1991) (testimony of Henry S. Cole, Director, Clean Water Action). EPA has accordingly previously stated that "[i]t is not clear that potential re-use mitigates environmental contamination." See USEPA Office of Research and Development, *Methodology for Assessing Environmental Releases of and Exposure to Municipal Solid Waste Combustor Residuals*, 4-8 to 4-10 (April 1991) (EPA/600/8-91/031).

in RCRA, EPA has broadly defined the meaning of "waste" under Subtitle C to include many activities that involve the reuse of hazardous waste, in order to ensure that such activities do not escape Subtitle C's strict scrutiny.<sup>14</sup>

Under the City's reading, however, none of these possible reuses of hazardous ash would be prohibited or even restricted. The possibility of such reuses is, according to the City's amici, a reason why hazardous ash containing high levels of lead and cadmium should *not* be subject to Subtitle C. We cannot agree. And, more importantly, the language of Section 3001(i) does not support the City's contention that Congress intended to endorse such a perverse and dangerous result.

B. Our reading of Section 3001(i) is also directly supported by RCRA's overriding policy "that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." 42 U.S.C. 6902(b). If, as we believe was Congress'

<sup>14</sup> In 1985, EPA addressed the issue of the extent to which hazardous byproducts should be considered "hazardous waste" when those byproducts are subject to potential beneficial reuses. EPA rejected a definition of "solid waste" within the context of Subtitle C that would have had the effect of removing these reusable hazardous materials from Subtitle C regulation. See 40 C.F.R. 261.2 (defining "solid waste" for purposes of Subtitle C); 40 C.F.R. 261.4 (exclusions from definition of "solid waste"). According to the agency, "regulation of most of these activities is necessary to protect human health and the environment. \* \* \* \* \* Simply because a waste is likely to be recycled will not ensure that it will not be spilled or leaked before recycling occurs." 50 Fed. Reg. 617. EPA even addressed the risks created by the very kinds of reuses that the City and its amici propose for hazardous ash, and the agency concluded that those activities should be subject to Subtitle C regulation. *Id.* at 628 (emphasis in original) (Subtitle C "appl[ies] not only to hazardous secondary materials used on the land without significant change but also to *all* products containing these wastes that are applied to the land \* \* \*. Thus, fertilizers, asphalt, and building foundation materials that use hazardous wastes as ingredients and are then applied to the land are subject to RCRA jurisdiction.").

intent, municipalities must pay the higher cost of disposing of hazardous ash at a facility designed for hazardous waste, they will likely take the steps now readily available to minimize their generation of hazardous ash.

For instance, the City could separate bottom ash from fly ash.<sup>15</sup> Fly ash typically constitutes only about ten percent of the weight of the ash generated, and is the material far more likely to fail the toxicity characteristic analysis. See *Regulation of Municipal Solid Waste Incinerators, Hearing before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce on H.R. 2162*, 101st Cong., 1st Sess. 43 (1989) (testimony of Sylvia K. Lowrance, Director, USEPA Office of Solid Waste) (hereinafter "*House Hearing on H.R. 2162*"). Like most municipalities, the City of Chicago currently combines these two kinds of ash for disposal, thereby substantially increasing the volume of hazardous waste produced.

In addition, the City could reform its waste collection and incinerator intake processes to reduce the likelihood of any of the ash residue being hazardous. For instance, greater emphasis on materials recovery designed to eliminate materials such as discarded batteries and other identifiable sources of toxic heavy metals from that combusted could dramatically reduce the likelihood that the resulting ash is hazardous. Programs aimed at reducing household disposal of batteries, such as deposit/refund initiatives, could also have a significant beneficial impact. See generally Franklin Associates, *Characterization of Products Containing Lead and Cadmium in Municipal Solid Waste in the*

<sup>15</sup> Fly ash consists of small particles that travel outside of the combustion chamber where the ash is collected by pollution control devices. Bottom ash is the material that remains on the bottom of the combustion chamber. Because many metals vaporize during the intense heat of incineration, move up the stack, and condense on particulate matter, the concentration of leachate metal on ash tends to be higher on fly ash than on bottom ash. Richard A. Denison & John Ruston, *Recycling & Incineration -- Evaluating the Choices*, 177, 184 (1990).

United States 1970 to 2000 (EPA Office of Solid Waste, January 1989); *Resource Conservation and Recovery Act Oversight, Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Sen. Comm. on Environment and Public Works*, 100th Cong., 1st Sess. Pt. 2, 5-11 (1987); Peter Menell, *Beyond the Throwaway Society: An Incentive Approach to Regulating Municipal Solid Waste*, 17 Ecol. L. Q. 655 (1990). Such measures would further RCRA's stated purpose to "minimiz[e] the generation of hazardous waste and the land disposal of hazardous waste by encouraging \* \* \* materials recovery." 42 U.S.C. 6902(6).

C. The City's claim that a broad reading of Section 3001(i) is in fact supported by RCRA's purposes rests on a series of erroneous assumptions regarding the relationship of Subtitle C to resource recovery facilities. The City's contention is also rooted in gross exaggerations of the likely impact on municipal waste incinerators of requiring hazardous ash, like other hazardous wastes, to be subject to the safeguards of Subtitle C.

1. At the outset, the City's argument based on RCRA's purposes, like its earlier plain meaning argument, rests on the mistaken assumption that Section 3001(i) confers no meaningful benefit on its resource recovery facility unless it exempts the ash from Subtitle C regulation. As previously described (see pages 10-11), quite the opposite is true. Under the court of appeals' construction, which we support, Section 3001(i) provides the City with a generous regulatory exemption by deeming the "municipal solid waste" that it receives and burns not to be a hazardous waste, notwithstanding that household waste is known to include hazardous constituents. The effect of that legal fiction is that the City avoids many of Subtitle C's most demanding requirements.

2. The City is likewise mistaken in describing the extent to which Congress desired to promote resource recovery at the expense of environmental protection and human health concerns. The City contends (Br. 13) that "[t]o encourage resource recovery, Congress exempted resource recovery facilities from the complex regulations governing hazardous waste by enacting Section 3001(i)



of RCRA." Contrary to the City's contention, however, facilities that recover resources (whether in the form of energy or materials) from hazardous wastes are *not* exempt from, but are instead generally subject to the full panoply of Subtitle C regulations when those facilities manage or generate hazardous waste. The recycling or re-use of a hazardous waste for beneficial purposes does not automatically remove the waste from Subtitle C regulation. See 40 C.F.R. 261.2, 261.3; 50 Fed. Reg. 616-620 (1985); see note 14, *supra*. Nor does the burning of a hazardous waste to recover energy justify an exemption. Incinerators, boilers, and industrial furnaces that burn hazardous waste to recover energy are all generally subject to Subtitle C. See 40 C.F.R. Pt 264, Subpt O; 56 Fed. Reg. 7133-7240 (1991). Indeed, in enacting HSWA, Congress reversed a prior EPA policy that had exempted facilities that burned hazardous waste for the purpose of recovering energy from Subtitle C. See 42 U.S.C. 6924(q); *Resource Conservation and Recovery Act Reauthorization, Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 273-75 (1982); *Solid Waste Disposal Act Amendments of 1983, Hearings before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. 195-97 (1983); see also 42 U.S.C. 6924(o)(1)(B).

Hence, at least Congress does not appear to share the City's belief (Br. 21) that if resource recovery facilities are "subject to Subtitle C regulation, there could be no meaningful chance to achieve the statutory goal of promoting resource recovery." Congress instead plainly subordinated the promotion of resource recovery to the protection of human health and the environment. Congress thus stated RCRA's purpose as "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources." 42 U.S.C. 6902(a)(10) (emphasis added).

The City's misreading of RCRA purposes and Section 3001(i) appears to derive from its wrongly assuming that recovery of energy from municipal waste combustion is the only type of

resource recovery facility that Congress sought to promote. RCRA defines "resource recovery" far more broadly, however, to mean "the recovery of material or energy from solid waste." 42 U.S.C. 6903(22). Because, moreover, other types of resource recovery facilities are, unlike the City's facility, subject to Subtitle C, the City is particularly hard pressed to claim that fulfillment of RCRA's resource recovery goals require extending Section 3001(i) beyond its plain terms to include the newly generated hazardous ash and thereby exempt downstream facilities that subsequently manage that hazardous ash.

The human health and environmental implications of such an expansion of Section 3001(i) beyond its narrow terms would also be enormous. The implications of our literal reading of Section 3001(i)-- which allows that the resource recovery facility is not managing hazardous waste in its receipt and burning of municipal solid waste--are more confined, even though household wastes may include modest amounts of hazardous materials. The resource recovery facility incinerates the municipal solid waste that it receives and its air emissions are subject to the Clean Air Act. See 42 U.S.C. 7429.

By contrast, the human health and environmental risks associated with a waste stream exemption that extends to ash, which the City proposes, are far greater. Those risks do not end at the resource recovery facility. That is instead where they begin. The operator of the facility and others who subsequently manage the hazardous ash it produces are permitted to treat, store, dispose, and reuse a hazardous waste throughout the nation as though the waste does not contain the hazardous substances that it does in fact contain.

Finally, the City greatly overstates the negative impact on municipal waste combustion facilities of applying Subtitle C to its hazardous ash.<sup>16</sup> Affirming the court of appeals' judgment would

<sup>16</sup> The briefs submitted by the City and its amici also consistently exaggerate the benefits of municipal solid waste incineration. For instance, the amicus brief filed on behalf of the



not mean that all incinerator ash would automatically be considered a hazardous waste. Only that ash exhibiting the kind and concentration of hazardous constituents and characteristics that are the subject of EPA's testing procedures would be so classified. Here, the hazardousness of the City's ash is not disputed for the purposes of this litigation. But there is no reason to assume that all ash would be a hazardous waste. Instead, as previously described (see pages 26-27, *supra*), there are many economic

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National League of Cities states a claim repeated in many of the briefs regarding the extent to which incineration of municipal waste decreases the volume and mass of waste to be landfilled. The brief asserts (p. 3) that "[i]ncineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%." But, in a more candid setting, the National League of Cities recently advised its members quite differently:

Often, the claim is made that 'incineration reduces the volume of waste by 75%' or some other high percentage. This claim can only be supported by making some misleading comparisons between the volume and weight of a typical ton of MSW and volume and weight of incinerator ash. The claim cannot be supported when you consider the overall garbage disposal needs of the entire community.

Municipal Incinerators: Fifty Questions Every Local Government Should Ask, 7 (National League of Cities, Dec. 1988). The National League of Cities stated that the "bottom line is that once it builds a WTE [waste to energy] facility, the community will still need approximately 40 percent of the landfill volume it would have needed without incineration." *Id.*

There is likewise reason to question the accuracy of the ten-fold cost differential between Subtitle C and Subtitle D landfills suggested by EPA (Pet. App. 48a-49a), which is repeated by the City and its amici. According to EPA's economic analysis of the new Subtitle D regulations, the average cost per ton of disposal under the new Subtitle D regulations will be approximately 2/7 of the average cost per ton of disposal under Subtitle C (see 56 Fed. Reg. 50986-50988 (1991)). Perhaps the ten-fold cost figures are derived from the old, less exacting Subtitle D regulations.

alternatives readily available to the City (separation of fly ash from bottom ash and materials separation programs) for reducing the volume of hazardous ash that its incinerator produces. For that reason, the likely effect of a ruling that Section 3001(i) does not immunize incinerator ash from RCRA Subtitle C regulation may well be to reduce significantly the amount of ash that is hazardous.<sup>17</sup>

### III. THE LEGISLATIVE HISTORY OF RCRA SECTION 3001(i) DOES NOT SUPPORT EXEMPTING HAZARDOUS ASH FROM SUBTITLE C REGULATION

The City's reliance (Br. 23-28) on legislative history is no more persuasive because much of the City's argument depends on the same misimpression of RCRA's promotion of resource recovery and of Subtitle C. See Br. 23-24. In fact, if the legislative history is at all relevant in construing a provision whose meaning is already plain (see *Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987)), it supports the narrower reading of Section 3001(i). The legislative history of the Hazardous and Solid Waste Amendments of 1984 (HSWA) reveals that Congress sought to close regulatory gaps, not create new ones. And, rather than support the City's claim, the committee report language upon which the City relies is unavailing. It only underscores the impropriety of such a report serving as a basis for adding language not contained in a statutory provision enacted by Congress. Finally, there is no merit to the City's claim that the legislative history demonstrates that Congress

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<sup>17</sup> Reportedly, much of the current economic plight of these municipal waste incinerators results from increased recycling and source separation, which reduces the amount of municipal waste available for incineration. See J. Bailey, *Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J. A1 (Aug. 11, 1993); B. Meier, *Finding Gold, Of a Sort, in Landfills*, NYT A14:4 (Sept. 7, 1993). RCRA, however, can hardly be read as intending to discourage waste minimization in order to create material for incinerators to destroy.

ratified EPA's pre-existing regulation that extended the household waste exclusion to ash residues.

A. The City's legislative history argument rests principally on the appearance of the word "generation" in part of a Senate Report purporting to describe the import of the language now contained in Section 3001(i) (then Section 3001(d)). Reproduced in context, the Senate Report provides:

New section 3001(d) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion \* \* \*.

S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983).

The first sentence simply confirms the driving force behind the clarification: to allow the mixture of household wastes with nonhazardous wastes from other sources. It is the second sentence, particularly its addition of the word "generation," upon which the City ultimately rests its entire case.

There has recently been much debate within this Court regarding the precise weight to be given legislative history in interpreting the meaning of ambiguous statutory language.<sup>18</sup>

<sup>18</sup> Compare, e.g., *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. 421, 433 n.12 (1987), *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55 (1989), and *Green v. Bock Laundry Machine*, 490 U.S. 504 (1989) with *Public Citizen v. United States Department of Justice*, 491 U.S. at 470-74 (Kennedy, J., concurring), *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291-93 (1988), *Immigration and Naturalization Service v. Cardozo-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring); and *Sable*

There should be no debate, however, on the impropriety of relying on the word "generation" to support the City's proffered interpretation. What the City seeks, in effect, is the addition of language that is missing from the statute. Congress, however, must legislate through legislation, not through legislative history.

To be sure, there are no doubt circumstances where courts are compelled to override the literal language of a statute, such as when necessary to avoid an obvious technical error or an absurd result. Cf. *Green v. Bock Laundry Machine*, 490 U.S. 504, 510 (1989). But under no circumstances can it be warranted where, as here, what the City seeks would amount to a huge expansion in the substantive scope of an exception to a public health law. Here, there is no suggestion in the legislative history that Congress ever considered the costs and benefits of such an exception and chose to embrace it. There is no suggestion in the legislative history that the absence of such an exception would defeat the purposes of the law or otherwise produce an untenable or absurd result that Congress could not have intended. Instead, as described above (pages 20-27, *supra*), the converse is closer to the mark.

Indeed, the sharp contrast between the committee report language and the actual statutory language -- with "generation" appearing in the former, but not the latter -- only underscores the impropriety of substituting the former for the latter. It suggests the possibility of committee staff awareness of the distinction, coupled with the inability, for whatever reason, to obtain a substantive change in the wording of the statute itself. The court of appeals below well explained why a court should not defer to a legislative report's addition of the term "generation" to those activities exempted from Subtitle C: "Why should we, then, rely upon a single word in a committee report that did not result in legislation. Simply put, we shouldn't." Pet. App. 18a. Where, moreover, as in this case, that addition portends such a significant expansion in the scope of Section 3001(i)'s reach, the resulting distinction between statute and report must be dispositive. See

*Communications v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring).



*American Hospital Ass'n v. National Labor Relations Board*, 111 S. Ct. 1539, 1545 (1991).<sup>19</sup>

B. The City alternatively argues (Br. 25-28) that the legislative history demonstrates congressional intent to ratify EPA's 1980 household waste exclusion, which extended to "residues" remaining after incineration of household waste. See 45 Fed. Reg. 33099 (1980). This argument, too, lacks merit. None of the indicia necessary to support congressional ratification of an existing agency interpretation is present in this case.

<sup>19</sup> Several Senators who were members of the Senate Environment and Public Works Committee at the time of the senate report and the same Senate Committee (Environment and Public Works) have since expressed the view that Section 3001(i) does not exempt hazardous ash from Subtitle C. See Pet. App. 12a-13a (summarizing letters sent to EPA by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell, and Rep. Florio); S. Rep. No. 101-228, 101st Cong., 1st Sess. 258-260 (1989). In addition, Congress has repeatedly declined since 1984 to pass legislation that would permit the disposal of municipal incinerator ash in Subtitle D landfills, even when, unlike the scheme proposed by the City, such permission would be conditioned upon the establishment under Subtitle D of a distinct, more exacting regulatory framework that would cover all aspects of ash management, including handling, treatment, transportation, reuse, recycling, storage, and disposal. See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988); *House Hearing on H.R. 2162, supra*; H.R. Rep. No. 101-1021, 101st Cong., 2d Sess. 233-234 (1991); S. Rep. No. 101-228, 101st Cong., 1st Sess. 258-260 (1989); S. Rep. No. 102-301, 102d Cong., 2d Sess. 56-60 (1992). The legislative assumption behind many of these proposals was that "[u]nder current law, municipal incinerator ash is subject to subtitle C or subtitle D depending on whether it passes or fails the extraction procedure (EP) toxicity test." S. Rep. No. 101-228, 101st Cong., 1st Sess. 258 (1989).

First, unlike the cases upon which the City relies,<sup>20</sup> Congress did not merely re-enact in whole or in part pre-existing statutory language for which there was a longstanding administrative interpretation when it passed HSWA in 1984. HSWA amounted to a major overhaul of the earlier 1976 law, and Congress, in HSWA, *added* Section 3001(i) in 1984. Congress could not, therefore, have been ratifying any pre-existing interpretation of the language of Section 3001(i). Congress was adding *new* language to RCRA and speaking to the issue for the first time. If, moreover, Congress was even aware of EPA's position with regard to ash in 1984, the language Congress ultimately enacted suggests congressional rejection, not endorsement, of EPA's view. Congress even titled Section 3001(i) a "Clarification of household waste exclusion," which hardly suggests that the legislators were merely endorsing what EPA had previously done. As the court of appeals below explained (Pet. App. 18a): "Although tossed around, the word 'generation' was not used in the final product. \* \* \* The actual words of the statute -- the end product of the rough-and-tumble of the political process -- are the definitive statement of congressional intent."<sup>21</sup>

Second, in virtually all of the cases in which the Court has found congressional ratification, the legislative history includes affirmative evidence that Congress was actually made aware of a

<sup>20</sup> *Merrill Lynch v. Curran*, 456 U.S. 353, 381 (1982); *Haig v. Agee*, 453 U.S. 280, 297 (1981); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

<sup>21</sup> See *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992) ("In 1984, Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation."); see also *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.").



longstanding administrative agency interpretation.<sup>22</sup> Here, as in *Demarest v. Manspeaker*, 484 U.S. at 190, where this Court rejected a similar ratification argument, "[t]here is no indication that Congress was aware of the administrative construction \* \* \* at the time it revised the statute." Congress can hardly be deemed, therefore, to have approved of EPA's view regarding the regulatory status of ash.

Finally, the City's reliance on ratification is misplaced because EPA's 1980 interpretation did not even address the issue presented here. The prior regulation only spoke to the question of ash produced from the incineration of household waste alone. Section 3001(i), however, permits the combustion of a mixture of household waste and other kinds of waste, which was not addressed by EPA's 1980 regulation.

The difference is significant, which is likely why EPA's first and, until recently, longstanding authoritative view was that ash generated from such a mixture was *not* entitled to the benefit of the household waste exclusion. See 50 Fed. Reg. 28726 (1985). Section 3001(i) dramatically expanded the practical scope of the household waste exclusion by allowing the mixture of household wastes with other sources of non-hazardous wastes. Under Section 3001(i), even a resource recovery facility that burns a substantial quantity of non-hazardous solid waste from non-household sources

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<sup>22</sup> *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 (1985); *North Haven Board of Education v. Bell*, 456 U.S. 512, 534 (1982); *Merrill Lynch v. Curran*, 456 U.S. at 382; *Haig v. Agee*, 453 U.S. at 297; *United States v. Board of Commissioners of Sheffield, ALA*, 435 U.S. at 135; *Lorillard v. Pons*, 434 U.S. at 581; *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). To be sure, in some of these very same cases, this Court speaks to how "Congress is presumed to be aware of an administrative \* \* \* interpretation of a statute and to adopt that interpretation when it reenacts a statute without change" (see, e.g., *Lorillard v. Pons*, 434 U.S. at 580-581), but the Court has nonetheless satisfied itself that such actual awareness is present rather than rely on the obvious fiction of awareness (see, e.g., *Lindahl v. Office of Personnel Management*, 470 U.S. at 782).

is entitled to that Section's exemption. As described above, that is a confined exemption from Subtitle C to the extent that the exemption means that the facility shall not be considered a Subtitle C TSD facility, notwithstanding its processing of the hazardous materials in household waste. But under the City's view, hazardous ash produced from such a facility -- the hazardous constituents of which could come from the non-hazardous solid waste and accumulate in the ash -- would likewise be exempt from Subtitle C. Hence, the "household waste" exception would be transformed into a far broader waste stream exemption for resource recovery facilities that burn large amounts of non-household solid waste and generate hazardous ash. Entities subsequently managing that ash would, under the City's reading, be exempt from Subtitle C. Nothing in RCRA suggests that Congress intended to create such a regulatory loophole so far removed from the purposes of the household waste exclusion.

#### IV. EPA'S VIEW THAT SECTION 3001(i) EXEMPTS MUNICIPAL INCINERATOR ASH FROM RCRA SUBTITLE C REGARDLESS OF ITS HAZARDOUSNESS IS NOT ENTITLED TO JUDICIAL DEFERENCE

In the alternative, the City endorses (Pet. Br. 29-34) EPA's contention that the statutory language is ambiguous and that the Court should therefore defer to EPA's interpretation, which currently supports the City. No such deference is owed EPA, however, because the statutory language is plain. In addition, EPA's current view is not the kind of authoritative interpretation reached pursuant to legislatively delegated lawmaking authority that is entitled to judicial deference.

A. "Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if a statute is unambiguous, the statute governs \* \* \*." *Stinson v. United States*, 113 S. Ct. 1913, 1918 (1993). Accordingly, this Court has repeatedly rejected an agency's interpretation when contrary to the

statute's plain meaning.<sup>23</sup> And, the Court has deferred to the agency's interpretation only where "Congress' silence or ambiguity has 'left a gap for the agency to fill.'" *Stinson v. United States*, 113 S. Ct. at 1918, quoting *Chevron*, 467 U.S. at 842-43.

Section 3001(i) is ambiguous, according to EPA (U.S. Br. 11), because the City's suggested construction is "plausible" and because "'Congress has not directly addressed the precise question at issue'" (quoting *Chevron*, 467 U.S. at 842). The Solicitor General, however, seriously misapprehends the threshold plain meaning inquiry required by *Chevron*. Indeed, under the Solicitor General's view, plain meaning would virtually never exist and *Chevron* deference would therefore almost always be warranted. The Executive Branch may desire such an approach, but that is not the teaching of this Court's precedent.

First, while for reasons already discussed (see Part I, *supra*) we do not believe that the City's reading is even "plausible," the mere plausibility of a competing construction falls far short of that necessary to persuade a court that a statute has no plain meaning. A majority of this Court has frequently relied on the plain meaning of a particular statutory provision to reject an agency construction, notwithstanding the dissenters' demonstration that an alternative, at least plausible construction, existed. See generally Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2091-2093 & nn. 97 & 103 (1990); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 990-993 (1992).<sup>24</sup> "An understanding that would allow

<sup>23</sup> See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 599 (1991); *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Department of Transportation v. Federal Labor Relations Authority*, 494 U.S. 922 (1990); *Dole v. United Steelworkers*, 494 U.S. 26, 42-43 (1990); *Sullivan v. Zebley*, 493 U.S. 521 (1990).

<sup>24</sup> "[T]he mere fact of a plausible alternative view is insufficient to trigger the *Chevron* rule." Sunstein, *supra*, 90 Colum. L. Rev. at 2091. Compare, e.g., *Dole v. United Steelworkers of America*, 494

the agency to prevail merely because there is some room for disagreement would pose an undue threat to the basic principle of congressional supremacy in lawmaking." Sunstein, *supra*, 90 Colum. L. Rev. at 2093. This Court's decisions make plain, moreover, that a merely "plausible" reading must bow in the face of a competing canon of statutory construction. See *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230-1231 (1991); *New York v. United States*, 112 S. Ct. 2408, 2425 (1992). As described earlier (see page 8, *supra*), the City's construction flies in the face of the settled canon that exemptions from remedial legislation like RCRA must be narrowly construed.

Second, the Solicitor General misapprehends what the Court means by Congress having "directly addressed the precise question at issue" in *Chevron* analysis. The Solicitor General relies on the absence of explicit statutory language discussing the status of ash per se to conclude that a statutory ambiguity is presented. But what the Solicitor General ignores, or at least seeks to obscure, is that the absence of an exception to a clear statutory mandate does not create an ambiguity. It simply means that no such exception exists.

Here, the statute on its face squarely addresses the issue. It provides that generators of hazardous waste must comply with certain requirements and it provides that those who treat, store, and dispose of hazardous waste must comply with other requirements. The statute does not create a household waste exception for any facility other than the resource recovery facility. And, with regard to that facility, the statute does not create an exception for resource recovery facilities applicable to their status as "generators" of hazardous waste.

U.S. 26, 42-43 (1990) with *id.* at 44-45 (White, J., dissenting); compare *Public Employment Retirement System of Ohio v. Betts*, 494 U.S. 158, 175-178 (1989) with *id.* at 183-190 (Marshall, J., dissenting); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) with *id.* at 125-126 (Stevens, J., dissenting).



Most simply put, a *Chevron* gap for an agency to fill does not exist whenever a statutory enactment fails to include an exception broader than the one actually included. Indeed, were the rule otherwise, there would never be such a thing as plain statutory language because it is always possible to imagine a statutory exception that Congress could have included, but did not. It is only where "Congress' silence \* \* \* has 'left a gap for the agency to fill' that *Chevron* deference may be appropriate." *Stinson v. United States*, 113 S. Ct. at 1918, quoting *Chevron*, 467 U.S. at 842-43. Here, no such gap exists.<sup>25</sup>

EPA understood this in 1985 when it first authoritatively construed Section 3001(i) immediately upon its enactment. EPA did not then find conflicting evidence of congressional intent with respect to whether Section 3001(i) exempts hazardous ash. EPA concluded that it did "not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28726 (1985). EPA understood that silence in the context of an otherwise firm statutory mandate did not create an ambiguity about what Congress intended. There was simply no intent to exempt hazardous ash

<sup>25</sup> This Court's construction of RCRA in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), supports our view. At issue in *Hallstrom* was the petitioners' claim that they should not be barred from maintaining their lawsuit against an alleged violator of RCRA although petitioners had failed to satisfy the notice and waiting period requirements set forth in RCRA for the bringing of a citizen suit enforcement action. See 42 U.S.C. 6972(b)(1)(A)&(B). The reasons why this Court rejected petitioners' claim are equally applicable here. The Court reasoned that "Congress could have excepted parties from complying with the \* \* \* [statutory] requirement] \* \* \*. RCRA, however, contains no exception applicable to petitioners' situation; we are not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 493 U.S. at 26-27.

from Subtitle C regulation.<sup>26</sup> If any EPA construction is entitled to deference, it would be this one. It reflects the agency's contemporaneous view of congressional intent immediately after the law's passage. See *Good Samaritan Hosp. v. Shalala*, 113 S.Ct. at 2159; *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1978).

B. EPA's current view is not, in any event, entitled to the substantial degree of deference accorded under *Chevron*. This is both because of the number of times that EPA has changed its mind on the ash issue and the manner in which EPA reached its most recent view.

1. It is well settled that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration & Naturalization Service v. Cardozo-Fonseca*, 480 U.S. at 446 n.30, quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2534 (1991); see *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161. As described by the court of appeals (Pet. App. 2a-3a, 11a-16a), EPA's interpretive gymnastics on this score border on the Olympic given the number of agency flip-flops on the ash issue.

To be sure, an agency is entitled to change its mind, particularly when Congress has left a policy matter for the agency to determine. Indeed, such changes are quite often the normal product of the political process. See, e.g., *Chevron*, 467 U.S. at 863-64, 865-66. But in this case, EPA did not merely shift its

<sup>26</sup> In 1985, EPA recognized why Congress had included Section 3001(i) in HSWA: to ensure that resource recovery facilities would not become TSD Subtitle C facilities because of what they received. 50 Fed. Reg. 28725 (1985). EPA described the "principal purpose of Section 3001(i) [as] to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations." *Id.* at 28726.



policy view; the agency changed its mind regarding what Congress intended in Section 3001(i) and, in particular, whether congressional intent was ambiguous. On that question, there is no justification for a shifting agency view and, hence, no occasion for judicial deference.<sup>27</sup>

2. There are yet two additional reasons why EPA's current view is not entitled to *Chevron* deference. The first relates to the context in which the agency underwent its regulatory change-of-heart and the second relates to the form that the agency used to effectuate that change.

EPA announced its change in position several months after this Court invited its views in this case (when the case was first before the Court on the City's petition) and just shortly before the filing of the government's response to that invitation. Then-EPA Administrator Reilly did so by sending an internal agency memorandum to all EPA Regional Administrators. See Pet. App. 41a. And the Solicitor General then appended a copy of that memorandum to its own brief to this Court. See *City of Chicago v. EDF*, No. 91-1328, U.S. Br. App. 1a-11a.

The Solicitor General's appending of the EPA memorandum to its brief was a thinly disguised effort to avoid the Court's precedent for the purpose of claiming judicial deference to which

<sup>27</sup> There is no merit to EPA's claims that the agency's position has not been inconsistent. The government claims (U.S. Br. 23) that "EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented in this case. \* \* \* EPA has always acknowledged that a statutory gap exists that must be filled." Not so. EPA did initially say that the statute was "silent," but that was only in the sense that there was no explicit exception applicable to ash. The agency did not find that the statute was "ambiguous," but rather concluded, correctly in our view, that because of that silence the agency did "not see in this provision an intent" to exclude hazardous ash from Subtitle C. 50 Fed. Reg. 28726 (1985). Certainly, EPA never intimated that Congress had left it a "statutory gap" to be filled.

EPA would in no event be entitled. This Court has made clear that the principle of judicial deference to agency interpretation of statutory language does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213; see also *Cottage Savings Ass'n v. Commissioner*, 111 S.Ct. 1503, 1509 (1991).

The reason for the sudden appearance of the EPA memorandum, just before the filing of the Solicitor General's brief was obvious, notwithstanding that memorandum's careful avoidance of any reference to this pending litigation. The memorandum sought to create the appearance of the kind of agency interpretation to which this Court would provide deference under *Chevron*. At the end of the day, however, the agency's belated views on the issue in this case are entitled to the same level of deference that they would have been absent such pre-filing machinations: none at all.

Indeed, the way in which EPA announced its new view, wholly apart from its obvious relationship to pending litigation, provides a final independent basis for declining *Chevron* judicial deference to the agency view. The United States and the City wrongly assume that this Court accords *Chevron* deference to an agency's interpretation of a statute that the agency administers regardless of the form of that interpretation. That is not the case.

The only form of administrative agency interpretation that is clearly entitled to *Chevron* deference is an interpretation reached pursuant to legislatively delegated lawmaking authority, such as a legislative rule or an adjudicative determination. Those are the only agency rules or determinations that "have the 'force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1978); cf. *Stinson v. United States*, 113 S. Ct. at 1918.

The proper characterization of the memorandum upon which EPA and the City rely is not entirely clear. But what is clear is

that it is not a validly promulgated legislative rule or the result of an agency adjudication. The interpretation was announced in an internal agency memorandum sent to regional agency offices. There was no pretense of compliance with the Administrative Procedure Act notice and comment requirements that apply to EPA's promulgation of legislative rules. Absent such compliance, the memorandum, including the interpretation within it, cannot be considered a valid legislative rule. *Chrysler, supra*.

EPA's unstated assumption must therefore be that the memorandum qualifies for *Chevron* deference either as an interpretive rule or as a general statement of policy, neither of which must comply with the APA's notice and comment requirements to be valid. See 5 U.S.C. 553(b); see *Lincoln v. Vigil*, 113 S.Ct 2024, 2033 (1993). The agency's assumption is multiply flawed.

First, it is far from obvious that an agency's interpretive rule, which does not have the force of law, is entitled to the high degree of deference accorded under *Chevron*. See generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts*, 7 Yale J. Reg. 1, 55-58 (1990); Cass Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. at 2093-2094 & n.106. One basic reason why notice and comment is unnecessary for interpretive rules is because "interpretative rules--as merely interpretations of statutory provisions-- are subject to plenary judicial review." S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946). Where, therefore, as in this case, there has been no notice and comment period, it is especially important that judicial review not be limited.

The Administrative Conference of the United States (ACUS) has recognized just that. The Conference recently recommended that courts not give *Chevron* deference to agency interpretations contained in interpretive rules unless, as is not the circumstance here, "the reviewing court finds a congressional delegation of authority to make definitive interpretations in an informal format." ACUS Recommendation 89-5, 1 C.F.R. 305.89-5. The Conference encouraged agencies to use informal means to keep the

public apprised of their statutory interpretations, but emphasized that "it is important for both agencies and courts to remember that these informal expressions should not be accorded the same weight as definitive agency interpretations." *Id.*

This Court's decisions are consistent with this approach. The Court has long characterized interpretive rules as having the "power to persuade" but not the "power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). According to the Court, such less formal interpretations are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers," but instead only to "some weight on judicial review." *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1179 (1991) (citations omitted);<sup>28</sup> see *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("By way of contrast to [legislative rules], a court is not required to give effect to an interpretative regulation"); cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

In *Davis v. United States*, 495 U.S. 472, 484 (1990), this Court likewise noted the distinction: "Although the Service's interpretive rulings *do not have the force and effect of regulations*, \* \* \* we give an agency's interpretations and practices considerable weight *where they involve the contemporaneous construction of a statute and where they have been in long use*" (emphasis added). But, as described above, the agency's

<sup>28</sup> In *Martin*, the Court contrasted the promulgation of interpretive rules from the formal issuance of a citation and, relying on the fact that the latter "assumes a form expressly provided for by Congress" in the relevant statute (111 S. Ct. at 1179, citing 29 U.S.C. 658), concluded that an agency's interpretation of its own regulations contained in the latter was entitled to great deference. In this case, EPA's proffered interpretation is contained in a mere interpretive rule, purports to change and not interpret pre-existing agency rules, and does not "assume a form expressly provided for by Congress" in RCRA.



interpretation at issue in this case, unlike that in *Davis*, lacks those additional, crucial features. EPA's new view is inconsistent with the agency's contemporaneous construction of RCRA and has not long been in use. See also *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1235 (1991) (declining to provide *Chevron* deference to EEOC guidelines).

Second, the analysis is no different if EPA's memorandum is instead characterized as a "general statement of policy" rather than as an interpretive rule.<sup>29</sup> Such general statements of policy cannot bind persons outside the agency, precisely because they have been issued without the procedural safeguards provided by the APA. Those safeguards serve an essential function. They provide fairness to affected parties, enhance accuracy, promote reasoned agency decisionmaking and ensure a full ventilation of the relevant policy considerations prior to a formal agency determination.

The absence of such procedural safeguards also supplies the reason why general statements of policy, like interpretive rules, are not entitled to *Chevron* deference. See Anthony, *supra*, 7 Yale J. Reg. at 55. Congress has not delegated to EPA the authority to issue binding agency interpretations in a format other than a legislative rule. It is therefore no matter whether the absence of such APA procedures means that EPA's memorandum is a general

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<sup>29</sup> The reason why the Reilly memorandum could be considered a "general statement of policy," within the meaning of the APA, is that interpretive rules generally do not purport to make policy. "Interpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Chrysler*, 441 U.S. at 302 n.31, quoting Attorney General's Manual on the Administrative Procedure Act, 30 n.3 (1947). They interpret language of a statute that has some "tangible" or "specific meaning." Robert A. Anthony, *Interpretive Rules, Policy Statements, Manuals, and the Like -- Should Federal Agencies Use Them to Bind the Public*, 41 Duke L. J. 1311, 1325 & n.64 (1992); see also Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L. J. 187, 191-192 (1992).

statement of policy or an interpretive rule. In either circumstance, it does not reflect the kind of careful and reasoned agency policymaking determination that this Court has held is entitled to *Chevron* deference. Cf. *American Hospital Ass'n v. National Labor Relations Board*, 111 S. Ct. 1539, 1546 (1991) ("extensive notice and comment rulemaking" and "careful analysis of the comments that it received").<sup>30</sup> Hence, although EPA may certainly issue such internal agency memoranda -- and indeed may need to do so in many circumstances to respond to pressing issues -- the agency cannot reasonably expect those memoranda that purport to interpret statutory language to receive *Chevron* deference.

3. Finally, the substantive inadequacies in EPA's reasoning in the Reilly memorandum underscore why *Chevron* deference is not warranted when, as here, an agency announces a new statutory interpretation in such an informal manner. EPA contends (Pet. App. 46a-49a) that its new Subtitle D Part 258 regulations are sufficient to regulate ash in a manner that will protect human health and the environment. What EPA fails to consider, however, is that those regulations do not purport to address the full range of problems that hazardous ash presents. Indeed, those regulations expressly apply only to "nonhazardous municipal waste combustion ash." 56 Fed. Reg. 51000 (1991) (emphasis added).

Hence, while EPA has repeatedly acknowledged that the pre-disposal activities associated with hazardous ash, such as its transportation, storage, and reuse, pose significant hazards,<sup>31</sup> the

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<sup>30</sup> Perhaps reflecting the agency's awareness that its current position may not be the result of considered deliberation, the Solicitor General advises in his brief before this Court that the Agency's view "could be revised again" (U.S. Br. 9).

<sup>31</sup> See 55 Fed. Reg. 17303-17304 (1990); USEPA Office of Research and Development, Methodology for Assessing Environmental Releases of and Exposure to Municipal Solid Waste Combustor Residuals, 4-1 to 4-11, 5-1 to 5-15 (April 1991) (EPA/600/8-91/031); *House Hearing on H.R. 2162*, 101st Cong., 1st



Subtitle D Part 258 regulations do not address those issues at all. See 55 Fed. Reg. 17303-17304 (1990). The Part 258 regulations address only the design and operation of landfill disposal sites; they completely ignore these other significant activities, leaving them unregulated. Subtitle C regulation would, in contrast, provide for the kind of comprehensive "cradle to grave" approach that Congress (and heretofore EPA) has always deemed necessary for the management of hazardous waste.

In addition, EPA fails to consider that, even with respect to landfill disposal, the requirements specified under the Part 258 landfill regulations are far less stringent than those previously recommended by EPA. For instance, in 1987, EPA advised Congress that "in most locations, a composite or a double liner system will be necessary to be protective of human health and the environment." *Resource Conservation and Recovery Act Oversight, Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on the Environment and Public Works*, 100th Cong., 1st Sess. 445 (1987) (EPA responses to prehearing questions) (hereinafter *RCRA 1987 Oversight Hearings*). EPA further asserted that "fly ash, if handled separately, should be stored or disposed of only in a monofill" (*id.*) and that "monofilling is the preferred method of storage or disposal of bottom ash or combined (fly ash and bottom ash) but [we] realize that in some cases co-disposal may be the best available option" (*id.* at 444). The Part 258 regulations, however, express no preference for monofilling; nor do they establish additional requirements applicable to co-disposal units.

EPA had also, understandably, previously supported more stringent design requirements for the disposal of fly ash than for the disposal of bottom ash. EPA specified that fly ash be monofilled only in a double-lined facility (as is generally required under Subtitle C) that utilizes a leachate collection system above and between the liners. *RCRA 1987 Oversight Hearings, supra*, at

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Sess. 45, 46-48, 50-51 (1989) (testimony of Sylvia K. Lowrance, Director, USEPA Office of Solid Waste); see also R.34 at ¶18.

444-445 In contrast, Part 258 includes no such requirement applicable to the monofilling of fly ash.

Finally, EPA ignores a critical underlying assumption that it made when it promulgated its final Part 258 regulations. EPA concluded that those regulations would be adequate to protect human health and the environment based on the assumption that "the quality of leachate from [municipal solid waste landfills] will improve over time." 56 Fed. Reg. 50982 (1991). In particular, EPA anticipated "positive changes in the leachate resulting from \* \* \* the addition of new RCRA hazardous waste listings and characteristics \* \* \* [which] would divert waste currently disposed of at subtitle D facilities to subtitle C facilities." *Id.* Of course, EPA's new view regarding the *nonapplicability* of subtitle C to hazardous ash will have the exact opposite effect. It will increase the presence of hazardous constituents at subtitle D landfills and therefore decrease the quality of the resulting leachate.

EPA, however, offers no explanation for its change-of-heart regarding the effectiveness of the Part 258 regulations to address the problems of hazardous ash. Nor does the Solicitor General confront the issue in the government's brief in this case. The likely reason why neither does also provides the reason why *Chevron* deference is not warranted. EPA's new view is not based on the kinds of rulemaking or adjudicatory records that provide for a full ventilation of the issues and promote reasoned decisionmaking.<sup>32</sup>

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<sup>32</sup> Notably, EPA's current stance on the regulatory status of ash under RCRA is difficult to square with the analogous issue of how domestic sewage should be regulated under RCRA. RCRA specifically excludes "solid or dissolved material in domestic sewage" from the definition of "solid waste" (and therefore "hazardous waste" because hazardous waste is a subset of solid waste). See 42 U.S.C. 6903(27), 6903(5). This exclusion extends, like the household waste exclusion, to "any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment." 40 C.F.R. 261.4(a)(1)(ii). The rationale of the domestic sewage exception is not unlike that of the household waste

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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exclusion: to promote the operation of municipal waste treatment facilities when doing so does not create unreasonable environmental risks. In the context of domestic sewage, however, EPA has properly recognized the limits of that rationale. EPA has concluded that when the sludge resulting from that treatment facility is toxic, meaning that it fails EPA's toxicity test, that waste must be disposed of as a hazardous waste under RCRA Subtitle C. See 52 Fed. Reg. 23478 (1987); see also 58 Fed. Reg. 9248, 9253 (1993). The domestic sewage exception no longer applies. Of course, that is precisely why the household waste exclusion should no longer apply to ash resulting from the treatment of a mixture of household waste and other wastes, when that ash is hazardous.

## APPENDIX

## RELEVANT STATUTORY PROVISIONS

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(i), provides:

## (i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--

- (1) such facility--
  - (A) receives and burns only--
    - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
    - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
  - (B) does not accept hazardous wastes identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7) provide:

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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## REPLY BRIEF OF THE PETITIONERS

**SECTION 3001(i) OF RCRA EXCLUDES THE ASH  
PRODUCED AT A RESOURCE RECOVERY FACILITY  
THAT BURNS HOUSEHOLD WASTE AND NON-  
HAZARDOUS COMMERCIAL WASTE FROM REGU-  
LATION AS A HAZARDOUS WASTE.**

**A. The Plain Language Of Section 3001(i) Exempts The  
Ash Residue Produced At A Resource Recovery Facil-  
ity Burning Municipal Solid Waste From Regulation  
As A Hazardous Waste.**

Although EDF agrees with the City that “[t]he starting point in interpreting a statute is its plain language \* \* \*,” *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2157 (1993) (quoted in Resp. Br. 7), EDF bases its argument not on the actual language enacted by Congress in Section 3001(i), but rather on the absence of the word “generation.” In the process, EDF has disregarded the plain meaning of the words actually contained in the statute. The plain terms of Section 3001(i) provide that a resource recovery facility burning municipal solid waste is not to be deemed to be storing, treating, managing, collecting, transporting, or disposing of hazardous waste. Congress had no need to add the term “generating” to Section 3001(i) to exempt the ash produced at a municipal incinerator from regulation as a hazardous waste because the plain terms of that Section provide an exemption for every step in the process of handling the ash. The ash is collected, stored, transported, and disposed of in a landfill. Each of these activities falls within the statutorily defined terms in Section 3001(i) and is, therefore, exempt from hazardous waste regulation.

EDF insists that the word “generation” is necessary, even though the process by which the ash is produced—incineration—falls squarely within the statutory definition of “treatment,” and treatment is an exempt activity under Section 3001(i). EDF claims that the City cannot rely

on the exemption for treatment because “generation” is a distinct activity that is not exempt from regulation under Section 3001(i), but this claim is based on EDF’s unfounded assertion that “treatment” and “generation” are two different activities. See Resp. Br. 14. In this case, there is but one single activity—incineration—that is both the process by which ash is “generated” and “treatment” within the meaning of RCRA.<sup>1</sup> Indeed, EDF acknowledges, as it must, that it is the combustion of waste that generates ash. See *id.* at 16. Since the activity that “generates” the ash is exempt from regulation as “treatment,” the word “generation” would have been superfluous had Congress included it in Section 3001(i). Thus, its absence in no way indicates that the ash produced at a resource recovery facility is subject to hazardous waste regulations.<sup>2</sup>

More important, as we note in our opening brief, EDF’s argument produces a result precisely the opposite of what the plain language of Section 3001(i) states. If the ash produced by incineration of municipal solid waste at a resource recovery facility were subject to regulation under

<sup>1</sup> We also explain in our opening brief that the term “generation” is inapplicable to waste incineration because material becomes “waste” under RCRA only when it is discarded, and not when it is burned. Pet. Br. 17. EDF responds that this reading would exempt from Subtitle C regulation any entity that handles material that has previously been discarded. Resp. Br. 14-16. But entities with no exemption analogous to Section 3001(i) are still subject to Subtitle C if they treat, store, transport, or dispose of hazardous waste. These entities are subject to regulation because the activities they engage in fall under Subtitle C, not because they “generate” waste.

<sup>2</sup> For this reason, EDF’s reference to the provision in 42 U.S.C. § 6921 note—that those who recover methane from landfills “shall not be deemed to be managing, generating, transporting, treating, storing or disposing of hazardous or liquid wastes,” see Resp. Br. 18—is irrelevant here. Entities recovering methane do not burn it. They acquire it. Thus, recovering methane does not fall within the statutory definition of “treatment.” Congress added the term “generating” because the recovery of methane does not fall within any of the other exemptions.

Subtitle C, the facility would be required to store, transport, and dispose of the ash as a hazardous waste. But the plain language of Section 3001(i) states that these resource recovery facilities “shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes.” 42 U.S.C. § 6921(i). The language of Section 3001(i) does not limit a resource recovery facility’s exemption from Subtitle C regulation to activities prior to the time the waste is incinerated; the exemption is granted without temporal limitation. It applies to everything a resource recovery facility does, not just its handling of waste prior to incineration.<sup>3</sup>

To explain away this textual problem with its argument, EDF contends, first, that the only waste the statute says shall not be deemed to be hazardous waste is the municipal solid waste that is received and burned at a resource recovery facility. See Resp. Br. 16. But that is not what the statute says. If Congress had intended to limit the scope of Section 3001(i) to activities prior to incineration, the statute would provide that the municipal solid waste “received and burned at a resource recovery facility” shall not be deemed to be hazardous waste for purposes of regulation. But Section 3001(i) forbids subjecting a resource recovery facility to Subtitle C regulation without qualification: “[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the pur-

<sup>3</sup> For the same reason, the United States is incorrect when it suggests that Section 3001(i) is ambiguous. The United States has suggested that Section 3001(i) may plausibly be construed to exempt only hazardous wastes contained in the incoming waste, but not the ash, from regulation as a hazardous waste. See U.S. Br. 10. As we explain above, this construction is contrary to the plain meaning of the statute because, if Subtitle C applies to the ash produced, stored, and collected at a resource recovery facility, then that facility would be deemed to be storing, disposing of, and managing hazardous waste, in plain violation of the clear command of Section 3001(i).

poses of regulation [under Subtitle C] \* \* \*.” 42 U.S.C. § 6921(i). Nothing in this language limits the exemption provided for a resource recovery facility to the municipal solid waste that is received and burned, and nothing in the language can be construed to mean that waste at a resource recovery facility becomes subject to Subtitle C regulation once burned. EDF’s construction of the statute thus conflicts with the plain meaning of the statutory language by deeming the City’s facility to be collecting, storing, transporting, disposing of, and otherwise managing hazardous waste in the form of ash.

Alternatively, EDF argues that without the word “generating,” any exemption provided by Section 3001(i) does not apply to a “downstream” entity that may accept the ash for transport, storage, or disposal. See Resp. Br. 17. This argument is wrong for three reasons. First, it is no more consistent with the plain language than is EDF’s primary argument. It is the resource recovery facility itself that must find a way to dispose of the ash it produces. If Subtitle C regulation applies to downstream entities such as landfills, then as EDF acknowledges, Resp. Br. 17, those entities will charge the resource recovery facility the rates for managing, transporting, and disposing of hazardous waste. If resource recovery facilities must pay to manage, transport, and dispose of the ash as hazardous waste, such facilities will, for all practical purposes, be deemed to be managing, transporting, and disposing of hazardous waste regulated under Subtitle C. But that result is forbidden by the language of Section 3001(i).

Second, Congress could not have intended to create an exemption that turned upon whether a resource recovery facility itself transported and disposed of its ash in its own landfill, or used a contractor to transport and dispose of its ash. Although we of course disagree with EDF’s claim that the exemption does not apply to an entity downstream from the resource recovery facility, the flaw in its argument can clearly be seen from the absurd-

ity of this position. If Congress had intended to regulate municipal ash as a hazardous waste, surely it would not have intended to exempt the ash if the facility used its own trucks and drivers to transport the ash and its own landfill, instead of utilizing a downstream facility. The exemption either applies to the ash or it does not; but it cannot possibly depend on whether a resource recovery facility hires contractors to transport and dispose of its ash.

Third, Section 3001(i) must reach downstream activities because it expressly exempts “disposal” of municipal solid waste from Subtitle C regulation, and municipal solid waste is not “disposed of” until after it is burned and placed in a landfill. EDF offers two explanations of what the term “disposal” could mean under its reading of the statute, but neither is persuasive. It first claims that burning waste constitutes disposal. Resp. Br. at 13. But RCRA defines the term “disposal” as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Placing waste into an incinerator and burning it simply does not fall within this definition—it does not discharge, deposit, inject, dump, spill, leak, or place the waste into or on any land or water. See National League of Cities Br. 16. It is the ash, not the waste that is incinerated, that is disposed of by being placed into a landfill.

EDF’s second claim is that “disposal” refers to the waste that the facility does not burn. See Resp. Br. 13-14. But Section 3001(i) applies to facilities that recover energy from “the mass burning of municipal solid waste,” with restrictions on the types of waste that the facility “receives and burns,” not upon the waste that the facility receives and does not burn. See 42 U.S.C. § 6921(i).



Congress could not have intended that the exemption for disposal would apply only to waste that is not burned. At any rate, since the facility may not accept hazardous waste, none of the waste that is disposed of, but not burned, is subject to hazardous waste regulation even without regard to Section 3001(i). As we note in our opening brief, because a resource recovery facility may accept only household waste and nonhazardous commercial waste to qualify for the exemption, the only potentially hazardous waste that a resource recovery facility disposes of is the ash produced when the municipal solid waste is burned. Therefore, Section 3001(i) makes sense only if it exempts the ash produced at resources recovery facilities from hazardous waste regulations.

Finally, EDF notes that exceptions to remedial statutes should be narrowly construed. Resp. Br. 8, 39. But that canon of statutory construction is of no aid here, since both RCRA itself and Section 3001(i) are remedial legislation: RCRA is addressed to the regulation of waste disposal in general, while Section 3001(i) is specifically addressed to the municipal solid waste disposal crisis. Section 3001(i) should be read no more narrowly than any other portion of RCRA.

**B. The Object And Purpose Of Section 3001(i) Support Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.**

This Court looks to the "object and policy" of a statute, as well as its plain language, to determine its meaning. *E.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990). As we explain, see Pet. Br. 18-20, one of the goals of RCRA was to encourage the development of resource recovery facilities as an alternative to disposing of untreated garbage in landfills and as a means of recovering energy from solid waste.<sup>4</sup> To further this goal,

<sup>4</sup> EDF claims the City and its amici have exaggerated the benefits of municipal solid waste incineration. It disputes the accuracy of the statement by the National League of Cities, et al., that

Congress enacted, in Section 3001(i), an exemption for resource recovery facilities burning municipal solid waste. Subjecting these facilities to the potentially enormous expense of disposing of their ash as a hazardous waste would undermine that goal.<sup>5</sup>

EDF does not deny that encouraging resource recovery was one of the purposes of RCRA, but claims, in the face of Congress's repeated statements that one of its goals was to encourage resource recovery, see, *e.g.*, 42 U.S.C. § 6902(1), (10), (11); see also 42 U.S.C. § 6901(b)(1), (b)(8), (c)(1), (c)(3), (d)(2), (d)(3); § 6941a(2),

"[i]ncineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90%." Resp. Br. 29 n.16 (quoting National League of Cities Br. 3). EDF asserts that even with an incinerator, "the community will still need approximately 40 percent of the landfill volume it would have needed without incineration." *Id.* (quoting National League of Cities, *Municipal Incinerators: Fifty Questions Every Local Government Should Ask* 7 (1988)). The latter figure, however, is premised on the assumptions that 30% of a city's waste stream will not be incinerated because of downtime for incinerator maintenance and that the municipal waste stream will include materials that cannot be incinerated such as construction and demolition rubble and old appliances. See *Municipal Incinerators* at 6. Without these assumptions, the figure is 85%. In any event, the record in this case shows that every 10,000 cubic yards of City refuse is reduced to about 1,000 cubic yards of residue, a reduction of 90%. R. 18.

<sup>5</sup> EDF submits that to avoid the increased costs, local governments will reform their waste collection to reduce the likelihood that the ash will contain hazardous materials. Resp. Br. 26. This may be the outcome that EDF desires in order to further its policy goals, but it is by no means the likely result. Reformed waste collection may be costly and is no guarantee that the ash will not have to be managed and disposed of as a hazardous waste under EDF's view of the statute. It is far more likely, as numerous local governments have pointed out in their amicus briefs, that financially strapped local governments will reduce their costs by ending resource recovery efforts and disposing of untreated municipal solid waste in landfills. See National League of Cities Br. 8; Barron County et al. Br. 17 n.13. EDF has also ignored the fact that it will be difficult for municipalities to dispose of the ash as a hazardous waste because of the limited amount of space available in hazardous waste landfills. See, *e.g.*, N.Y. Br. 2.

(3), that we have overstated the extent to which Congress intended to promote resource recovery. EDF argues that Section 3001(i) should be interpreted only in light of what EDF selects as RCRA's most important purpose: minimizing the risks posed by hazardous waste. But Congress was balancing a number of competing purposes in RCRA. Section 3001(i) is plainly intended to further another of those goals—encouraging resource recovery as a means of addressing the municipal solid waste crisis. It makes no sense to interpret a section manifestly designed to encourage resource recovery only in light of some other goal of RCRA. And even if RCRA had some other goal as its primary purpose, this Court has cautioned that:

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

*Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (emphasis in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)).

EDF also argues that the entire thrust of the 1984 amendments to RCRA was to increase the stringency of controls on the disposal of hazardous wastes. Resp. Br. 21. This is certainly not true of Section 3001(i). Under no reading was it intended to increase the stringency of regulations on hazardous waste. On its face, Section 3001(i) creates an exception to the restrictions imposed on hazardous wastes. It plainly contemplates that some waste that would otherwise be considered hazardous is not to be regulated as a hazardous waste. Therefore, it simply cannot be interpreted as a part of an effort to increase the stringency of hazardous waste regulations.

Nor is it so incongruous, as EDF suggests, see Resp. Br. 21-22, that Congress would exempt the ash produced at a resource recovery facility from hazardous waste regu-

lations even though the ash might otherwise qualify as a hazardous waste. Other wastes have been exempted from Subtitle C regulations for policy reasons. Congress has, for example, exempted from Subtitle C regulation ash and other wastes generated by the combustion of coal or other fossil fuels; drilling fluid and other wastes associated with the exploration, development, or production of oil, natural gas or geothermal energy; solid waste from the extraction, beneficiation, and processing of ores and minerals; and cement kiln dust wastes. See 42 U.S.C. § 6921(b) (2), (3).<sup>6</sup> Congress thus has frequently balanced the costs and benefits of Subtitle C regulation and determined in some instances to exempt waste that might otherwise be considered hazardous.

EDF correctly notes that some types of resource recovery facilities—those that do not burn municipal solid waste—are regulated under Subtitle C. EDF therefore asserts that we have exaggerated the extent to which Congress wished to promote resource recovery. See Resp. Br. 28-29. But we have never argued that all resource recovery is exempt from Subtitle C regulation. Facilities that routinely accept and burn hazardous waste have received no exemption paralleling Section 3001(i)—plainly because the ash they generate poses greater environmental risks than the ash found at Section 3001(i) facilities that are forbidden to accept hazardous waste for incineration. But the fact that Congress has elected not to broaden Section 3001(i)'s exemption to reach other types of facilities does not mean that the exemption Congress did create should be read grudgingly.

We explain in our opening brief that the exemption provided by Section 3001(i) would be implausibly narrow

<sup>6</sup> Congress directed EPA to prepare a study and promulgate regulations governing these wastes, and exempted them from Subtitle C regulations pending the results of EPA's actions. 42 U.S.C. § 6921(b) (2), (b) (3) (A), (b) (3) (C); § 6982(f), (m), (n), (o), (p). These exclusions have continued, some because EPA has determined that the wastes should not be regulated under Subtitle C, and others pending the outcome of the studies. See *Wheelabrator Technologies Br. 8 & n.5* and regulations cited therein.



if it were not construed to apply to the ash produced at a resource recovery facility burning municipal solid waste. In response, EDF argues that the exemption is not narrow because it prevents a resource recovery facility from being considered a hazardous waste treatment, storage, or disposal (TSD) facility subject to Subtitle C permitting requirements. See Resp. Br. 9-10. Even without the Section 3001(i) exemption, however, a resource recovery facility that meets the criteria of that Section would not be a hazardous waste TSD facility because it does not accept hazardous waste.<sup>7</sup> A facility that does not accept hazardous waste for processing would not be subject to regulation as a hazardous waste TSD facility. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 763 n.12 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991). Therefore, if Section 3001(i) does not exempt the ash remaining after incineration, it provides little, if any, benefit, to a resource recovery facility. See *id.*

Nevertheless, EDF asserts that a resource recovery facility gains a benefit from Section 3001(i) because it will not be considered a hazardous waste TSD facility when it receives and burns household waste that may contain some hazardous components. See Resp. Br. 9. What EDF ignores, however, is that household waste has long been defined as non-hazardous by EPA regulations. See 40 C.F.R. § 261.4(b)(1) (1991). Under this household waste exclusion, still in effect, a facility that receives and burns only household waste would not be considered a hazardous waste TSD facility. See *id.* Therefore, if Section 3001(i) exempted only such facilities, it would indeed provide no benefit, for that facility would not be a

<sup>7</sup> A resource recovery facility falls within Section 3001(i) only if it "(A) receives and burns only (i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and (ii) solid waste from commercial and industrial sources that does not contain hazardous waste identified or listed under this section, and (B) does not accept hazardous wastes identified or listed under this section \* \* \*." 42 U.S.C. § 6921(i) (emphasis added).

hazardous waste TSD facility in the first instance. Even if that facility accepted both household waste and non-hazardous commercial waste (as Section 3001(i) permits), it would still not be a hazardous waste TSD facility because it would not be processing hazardous wastes. Given the EPA's household waste exclusion, EDF has yet to explain what Section 3001(i) accomplishes to encourage resource recovery if it does not apply to the ash produced at a resource recovery facility.

### **C. The Legislative History Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.**

Like the Seventh Circuit, EDF has focussed only on the word "generation" in the Senate Report. We do not rely on that word alone to find an intent to exempt all waste management activities of resource recovery facilities from hazardous waste regulations. The Senate Report must be read in its entirety. The full three paragraphs of the Report set out in our opening brief show that Congress wanted resource recovery facilities to be "commercially viable" and wanted to remove any impediments that might hinder their development, and intended Section 3001(i) to exempt all waste management activities of these facilities from hazardous waste regulations.

In fact, it is EDF that has focussed its argument on a single word. Its position depends entirely upon the absence of the word "generation" in Section 3001(i), and thus it argues that the presence of the word "generation" in the Senate Report underscores the importance of the omission of the word from the statute. See Resp. Br. 33. The presence of the word "generation" in the Senate Report, but not in the statute, however, by no means supports regulating the ash as a hazardous waste. As we explain in our opening brief and reiterate above, Congress did not need to include the word "generation" in Section 3001(i) because the plain meaning of the terms it did use reaches every activity of a resource recovery facility. A legislative report, however, need not be drafted as carefully



as a statute. Inclusion of an unnecessary word in the legislative history does not alter the plain terms of the statute. This is not a case, as EDF suggests, see Resp. Br. 33, in which the Court is asked to rely on legislative history to override the literal language of the statute. Instead, this is a case in which the legislative history serves to confirm that Congress intended exactly what it said in the statute. Indeed, EDF can point to nothing in the legislative history that reflects an intent to limit the exemption from hazardous waste regulation for resource recovery facilities to the facility's waste management activities prior to incineration.<sup>8</sup>

<sup>8</sup> EDF relies only upon letters written by several members of Congress three years after Section 3001(i) had been enacted, and upon subsequent unsuccessful attempts to pass legislation that would have placed certain, more stringent, requirements upon Subtitle D disposal of municipal incinerator ash. See Resp. Br. 34 n.19. Such subsequent legislative history has "very little, if any significance." *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)). Moreover, EDF's inference that Congress's failure to enact legislation regulating Subtitle D disposal of municipal incinerator ash indicates Congress did not intend to allow such disposal is not the only inference that can be drawn. This Court is "reluctant to draw inferences from Congress's failure to act." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)). And the legislation to which EDF refers did not merely provide for Subtitle D regulation of municipal ash; it would have created "under Subtitle D a distinct, more exacting regulatory framework." Resp. Br. 34 n.19. Thus it is equally if not more plausible that Congress did not enact this legislation because it believed that Subtitle D disposal of ash was adequate without additional regulation. See *United States v. Wise*, 370 U.S. 405, 411 (1962) ("Logically several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment \* \* \* including the inference that the existing legislation already incorporated the offered change."). Similarly unpersuasive is EDF's citation of a statement in a Senate Report accompanying one of these proposed amendments that under current law municipal incinerator ash could be regulated under Subtitle C if it tested as hazardous. S. Rep. No. 228, 101st Cong., 1st Sess. 258 (1989). As this Court has stated "[t]he interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has

Instead, the legislative history of Section 3001(i) shows that Congress intended to expand the existing EPA household waste exclusion. That exclusion provides that "[h]ousehold waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g. refuse-derived fuel) or reused" will not be considered a hazardous waste. 45 Fed. Reg. 33120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). Like the statute, the regulation does not use the word "generation"; yet EPA stated in the preamble that it extended to the ash remaining after incineration: "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33099. The legislative history of Section 3001(i) makes clear that Congress intended to expand the EPA household waste exclusion "to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Nowhere in the legislative history is there any hint that Congress intended to narrow the scope of the EPA household waste exclusion when it enacted Section 3001(i) to exempt facilities that take in non-hazardous commercial waste in addition to household waste. All indications are to the contrary.

EDF argues that since Congress was adding a new provision to RCRA when it enacted Section 3001(i), it could not have been ratifying an administrative interpretation of a pre-existing statute. Resp. Br. 34-36. But we have never claimed that Congress was ratifying an interpretation of a preexisting statute. Rather, our argument is that the legislative history demonstrates that Congress intended to expand the existing EPA household waste exclusion to apply to facilities that accepted nonhazardous commercial

no persuasive significance here." *United States v. Wise*, 370 U.S. at 411. See also, e.g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-20 & n.13 (1980).

waste in addition to facilities that accepted only household waste.<sup>9</sup> EDF responds to this point only by arguing that Congress did not intend to endorse what the EPA had done because it did not include the word “generation” in Section 3001(i). See Resp. Br. 35. The EPA household waste exclusion, however, also did not include the word “generation,” but nevertheless extended to ash. Congress’s failure to include a word that ~~did~~ not appear in the EPA regulation is not evidence that Congress intended to narrow the exemption. As we note in our opening brief, it indicates the opposite—Congress’s decision to use the same terminology used by the EPA indicates that Congress created an equivalent statutory exemption for resource recovery facilities taking in a broader range of wastes than those covered by the household waste exclusion.

EDF also argues that there is no affirmative evidence that Congress was aware of the EPA’s position on the household waste exclusion. Such evidence is not necessary. Congress is presumed to be aware of existing law and administrative interpretations. *Miles v. Apex Marine Corp.*, 489 U.S. 19, 32 (1990); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 (1985); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).<sup>10</sup> And if such evidence were necessary, it is present here. The Senate Report states that Section 3001(i) is intended to clarify the EPA household waste exclusion and refers to

<sup>9</sup> For the same reason, EDF’s claim (Resp. Br. 36) that we cannot rely upon ratification because the EPA’s household waste exclusion did not address the issue in this case—since it only exempted the ash produced from the incineration of household waste alone—is misplaced. Again, we have never argued that Congress ratified an EPA exclusion that applied to the ash produced at a resource recovery facility burning both household waste and non-hazardous commercial waste. The legislative history, however, shows that Congress enacted Section 3001(i) to include these resource recovery facilities within the EPA household waste exclusion. That exclusion included the ash left after incineration.

<sup>10</sup> *Demarest v. Manspeaker*, 498 U.S. 184 (1991), which EDF cites, is not to the contrary. In that case, this Court concluded that the administrative interpretation was inconsistent with the plain language of the statute. *Id.* at 190.

it as an exclusion applying to the “waste stream.” See S. Rep. No. 284, *supra*, at 61. Indeed, Congress entitled Section 3001(i) “Clarification of household waste exclusion,” and there is no suggestion that Congress intended to narrow that exclusion. Congress was thus plainly aware of the EPA household waste exclusion and that it applied to the entire waste stream, and not just waste before it is incinerated.

EPA’s household waste exclusion is also the answer to EDF’s related argument that Congress could not have intended municipal ash to be regulated only under Subtitle D, since it might be reused in unsafe ways. Resp. Br. 22-25. Resource recovery facilities are forbidden to accept anything but household and nonhazardous commercial waste. The household waste exclusion, which applied to the ash produced when household waste was incinerated, never forbade reuse of incinerated household waste, and there was no evidence before Congress when it enacted Section 3001(i) that municipal waste combustion ash had threatened the environment—nor had EPA ever taken that position. Thus, it is far more likely that Congress thought EPA should continue to monitor ash, and address any dangers it might pose under Subtitle D, rather than to restrict the household waste exclusion and impose enormous new costs on municipalities, without evidence that their ash posed serious environmental risks.

**D. If The Language Of Section 3001(i) Is Ambiguous, This Court Should Defer To The EPA’s Interpretation That The Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulation.**

The EPA, the agency charged with administering RCRA, has also interpreted Section 3001(i) to exempt from hazardous waste regulations the ash residue produced at resource recovery facilities when they incinerate municipal solid waste. See Pet. App. 41a. Although we believe that the language of Section 3001(i) and the object and purposes of RCRA plainly support exempting the ash from Subtitle C regulation, if this Court should



find the statute ambiguous, it should defer to the EPA's interpretation.

EDF offers several reasons why this Court should not defer to the EPA's interpretation. First, EDF claims that EPA "flip-flopped" too many times on the ash issue. Resp. Br. 41. Significantly, EDF does not describe any so-called flip-flops. In fact, EPA had only one prior position on the meaning of Section 3001(i), set forth in an interpretation contained in a preamble to its 1985 regulations, that was itself ambiguous. Although EPA announced that it did not see in Section 3001(i) an intent to exempt the ash from hazardous waste regulation if "the ash routinely exhibited a characteristic of hazardous waste," it went on to state that it had no plans to impose any new regulatory burdens on resource recovery facilities because of their highly beneficial nature. 50 Fed. Reg. 28726 (1985). The ambiguity of the preamble is underscored by the subsequent congressional testimony of two EPA officials, described by the court of appeals, see Pet. App. 14a-16a, who did not formally change the agency's position, see U.S. Br. 27 n.14, but who did express a desire to revisit the initial interpretation. Hence, there has been, at most, one change in EPA's position. And this Court has deferred to an agency's position even when it has changed. See, e.g., *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993); *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984). Even an agency's changed position is entitled to substantial deference "if there appears to have been a good reason for the change," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989), and if its change in position is supported by "reasoned analysis." *Rust v. Sullivan*, 111 S.Ct. at 1769 (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)). Here, EPA's position is supported by the cogent analysis contained in the administrator's memoran-

dum, and there was a good reason for the change. As the United States notes in its brief (at 24-25), EPA had recently promulgated stricter criteria for the disposal of municipal solid waste under Subtitle D. See 56 Fed. Reg. 50978 (1991) (to be codified at 40 C.F.R. Pt. 258). "The knowledge that EPA gained through promulgation of the Part 258 criteria and the changed circumstances led it to reevaluate previous policy concerns and to conclude that 'disposal of MWC ash in municipal landfills subject to Part 258 criteria will be protective of human health and the environment.'" U.S. Br. 25 (quoting Pet. App. 47a & n.5).

Second, EDF maintains that the EPA's position should be rejected because it is only the agency's litigating position. There is no merit to this claim. EPA is not a party to this case and, therefore, has no litigating position here. No agency interest in this litigation caused EPA to reach the result that it did. Nor is this case like *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), in which this Court refused to defer to an interpretation of a statute put forth by the agency's counsel "where the agency itself has articulated no position on the question \* \* \*." Here, the agency has articulated its position. As the United States has pointed out (Br. 27 n.13), there is nothing inappropriate about the agency's setting out its position on an issue that has given rise to litigation. See *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984). Indeed, the split in the circuits on this issue was all the more reason for the agency to take a position.

Third, EDF argues that the EPA memorandum setting forth the agency's position is entitled to no deference because it is not the result of a formal rule-making process. EDF claims that only agency positions reached pursuant to legislatively delegated rulemaking authority are entitled to deference. See Resp. Br. 43. But *Chevron* deference is far broader than EDF acknowledges. This Court stated in *Chevron* itself that while regulations prom-



ulgated pursuant to an express delegation of rulemaking authority are generally held to be controlling, see 467 U.S. at 844, interpretations reached without an express legislative delegation of authority to make administrative rulings are also entitled to deference if reasonable: "Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* (footnote omitted). Therefore, the EPA's interpretation of Section 3001(i), set forth in a memorandum of the Administrator, while not controlling, is nevertheless entitled to deference, since as we explain in our opening brief, it is reasonable.

Nor are the procedures of formal rulemaking prerequisites to *Chevron* deference, as EDF indicates. Agency policies need not be formal to be entitled to deference. This Court has deferred to agency staff opinion memoranda, see *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); informal commentary published by an agency that elaborates on its formal guidelines, see *Stinson v. United States*, 113 S. Ct. 1913, 1918-19 (1993); and agency opinion letters, see *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).<sup>11</sup> An agency position set forth by the head of the agency is entitled to similar deference. As the United States explained in its brief (Br. 26-27), "Administrator Reilly's directive is a formal interpretation by an agency head that establishes current agency policy, has binding effect on subordinate agency officials, and is therefore a legitimate source for *Chevron* deference."

<sup>11</sup> Cf. *United States v. Alaska*, 112 S. Ct. 1606, 1618-19 (1992) (recognizing that agency policies need not be part of formal regulations and that agencies may establish policy through the administration of agency programs); *Bowen v. Georgetown University Hospital*, 488 U.S. at 212 (principle of deference does not apply to agency positions unsupported by regulations, rulings, or administrative practice).

The principle of deference recognized in *Chevron* turns not on the form an administrator's decision takes, but rather on its substance. If an administrative interpretation is inconsistent with the plain language of a statute, or fails to consider the pertinent statutory factors, it does not merit deference. But when Congress has provided no clear guidance, decisions that involve "more a question of policy than law" must be made, *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); and such decisions "necessarily require significant expertise, and entail the exercise of judgment grounded in policy concerns." *Id.* Deference in such cases is appropriate based not on the form of the agency's decision, but rather because of this Court's "sensitivity to the proper roles of the political and administrative branches." *Id.* See, e.g., *Department of Treasury v. FLRA*, 494 U.S. 922, 933 (1990); *Chevron*, 467 U.S. at 844. If Section 3001(i) is ambiguous, EPA has the expertise to evaluate the costs and benefits of a proposed construction in light of the competing policies found in RCRA. While EDF believes that EPA has underestimated the environmental risks posed by municipal ash, that is precisely the type of judgment in which courts should be least willing to second guess the Administrator.

This observation disposes of EDF's final complaint—that EPA's interpretation of Section 3001(i) is substantively inadequate. Resp. Br. 47-49. In essence, EDF quarrels with EPA's conclusion that municipal incinerator ash can be regulated under Subtitle D in a manner that protects human health and the environment. As the United States explains, EPA's experience and scientific judgment has led it to a different conclusion. U.S. Br. 20-25. RCRA is a complex statute, and EPA is the agency with technical expertise in the area of the subject matter of the statute. The Administrator is ideally suited to weigh the environmental risks posed by disposing of municipal ash in Subtitle D facilities against the burdens on the resource recovery process if Subtitle C

regulation were imposed. He has done so, and found Subtitle D disposal adequate to protect human health and the environment. Here, as in *Chevron*, the Administrator has reconciled conflicting interests in a complex and technical area. It is precisely this type of policy judgment that calls most for deference to EPA, because it is a judgment better left to agencies than courts. EDF's open-ended invitation to this Court to reweigh competing statutory policies should be declined.

### CONCLUSION

For all the above reasons, the petitioners respectfully request this Court to reverse the judgment below.

Respectfully submitted,

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November 8, 1993

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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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THE CITY OF CHICAGO, ET AL., PETITIONERS

VS.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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### **QUESTION PRESENTED**

Whether Section 3001(i) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6921(i), exempts a resource recovery facility's municipal waste combustion ash from regulation as a hazardous waste under Subtitle C of that Act.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1639

THE CITY OF CHICAGO, ET AL., PETITIONERS

VS.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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**INTEREST OF THE UNITED STATES**

The United States plays a leading role through the Environmental Protection Agency (EPA) in implementing and administering federal environmental laws, including the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* EPA addressed the statutory question at issue here through a directive from its prior Administrator to the EPA Regional Administrators, and that directive remains in effect.

**STATEMENT**

Petitioners City of Chicago and its mayor operate a municipal incinerator that burns solid waste and recovers energy, leaving a residue of municipal waste combustion

(MWC) ash that is deposited in a landfill. Respondents Environmental Defense Fund, Inc., *et al.* (EDF) brought this action against petitioners alleging that they were violating provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to dispose of the MWC ash in accordance with the hazardous waste management requirements of RCRA Subtitle C, 42 U.S.C. 6921-6939. The United States District Court for the Northern District of Illinois granted summary judgment for petitioners, ruling that RCRA Section 3001(i), 42 U.S.C. 6921(i), exempts the ash residue from Subtitle C regulation. See Pet. App. 22a-37a. A divided court of appeals reversed. *Id.* at 5a-21a. This Court vacated that judgment and remanded the case for reconsideration in light of a directive that the Administrator of the EPA had recently issued to the EPA Regional Administrators. On remand, the court of appeals reinstated its prior judgment. *Id.* at 1a-4a.

1. RCRA is a comprehensive environmental statute that, among other things, empowers EPA to regulate hazardous wastes from "cradle to grave." *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Subtitle C of RCRA requires EPA to identify and list hazardous wastes, § 3001, 42 U.S.C. 6921, and to promulgate standards governing hazardous waste generators and transporters, §§ 3002, 3003, 42 U.S.C. 6922, 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities, § 3004, 42 U.S.C. 6924. EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements when they treat, store, or arrange for transportation or disposal of hazardous waste. See 40 C.F.R. Pt. 262.

In 1980, EPA issued regulations, pursuant to Section 3001 of RCRA, identifying and listing certain solid wastes

as hazardous wastes. See 45 Fed. Reg. 33,084. Based on the agency's interpretation of Congress's intent, EPA excluded various solid wastes that might otherwise be treated as hazardous waste from regulation under Subtitle C. See *id.* at 33,096-33,097. EPA specifically provided a "household waste" exclusion, stating in relevant part:

The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-used. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

*Id.* at 33,120 (codified as amended at 40 C.F.R. 261.4(b)(1) (1982)). EPA stated that the exclusion would extend to waste residues remaining after treatment, such as incinerator ash. 45 Fed. Reg. 33,099 (1980). See Pet. App. 25a-26a.

Four years later, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, which revised and supplemented RCRA in various respects. That Act (§ 213, 98 Stat. 3241) added Section 3001(i), entitled "Clarification of household waste exclusion." 42 U.S.C. 6921(i). Section 3001(i) states:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—



(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. 6921(i). Shortly thereafter, EPA revised its regulation containing the household waste exclusion. 50 Fed. Reg. 28,702 (1985). EPA retained its original regulatory language, but added the language of Section 3001(i) virtually verbatim. 40 C.F.R. 261.4(b)(1). See Pet. App. 26a-27a.

7. Since 1971, petitioner City of Chicago has owned and operated a resource recovery incinerator, the Northwest Waste-to-Energy Facility. The facility burns approximately 350,000 tons of solid waste each year, amounting to about 14% of the City's solid waste, and produces energy that is used within the facility and is sold to other companies. The City has disposed of the combustion residue—110,000 to 140,000 tons of MWC ash per year—at a landfill in Three Oaks, Michigan. Prior to this suit, the City, like many other municipalities, did not manage MWC ash as a RCRA Subtitle C hazardous waste. Pet. App. 5a-7a, 23a.<sup>1</sup>

<sup>1</sup> As of 1991, approximately 150 facilities incinerated municipal solid waste in a resource recovery facility. S. Levy, *Municipal Waste*

In 1988, EDF filed a complaint against petitioners under the citizen suit provisions of RCRA, § 7002, 42 U.S.C. 6972, alleging that petitioners were violating provisions of RCRA and EPA's RCRA regulations governing the management of hazardous waste. According to EDF, the MWC ash from the Northwest Waste-to-Energy Facility contained sufficient levels of lead and cadmium to subject the residue to regulation as a hazardous waste under RCRA Subtitle C. Petitioners responded that RCRA Section 3001(i) nevertheless excluded the MWC ash from Subtitle C requirements. The parties filed cross-motions for summary judgment contesting the application of Section 3001(i). Pet. App. 5a-7a, 22a-24a.

EDF claimed that although Section 3001(i) exempted petitioners from RCRA Subtitle C requirements related to "treating, storing, disposing of, or otherwise managing hazardous wastes," 42 U.S.C. 6921(i), it did not exempt petitioners from Subtitle C requirements related to generation of a distinct waste product, the MWC ash. Petitioners responded that Section 3001(i)'s reference to "disposing of, or otherwise managing hazardous wastes" exempted from Subtitle C requirements the entire process of incinerating the waste in a resource recovery facility, including management of the ash residue. Pet. App. 7a, 24a, 27a-28a.

The district court agreed with petitioners that RCRA Section 3001(i) exempts MWC ash produced at resource recovery facilities from regulation as hazardous waste. Pet. App. 7a, 24a-32a. The court denied petitioners' mo-

*Combustion Inventory 1* (EPA July 1992). In 1990, those facilities burned in aggregate about 29.7 million tons of municipal solid waste out of an estimated 195.7 million tons generated. *Characterization of Municipal Solid Waste in the United States: 1992 Update* 3-2 (EPA July 1992). See also Pet. 3-4.

tion for summary judgment, however, and allowed EDF to engage in discovery on whether the Chicago facility adequately met Section 3001(i)'s provisions prohibiting the facility from accepting commercial and industrial hazardous wastes. Pet. App. 7a, 32a-33a. EDF subsequently stipulated that it would not contest the adequacy of the facility's compliance with those prohibitions and that it would not oppose petitioners' renewed motion for summary judgment, which the court granted. See *id.* at 7a-8a, 34a-37a.

3. The court of appeals reversed. As a preliminary matter, the court rejected petitioners' claim that intervening legislation had rendered the matter moot. Pet. App. 8a-9a. Turning to the merits, the court observed that petitioners and EDF both relied on the "plain words of section 3001(i)" and that "EPA's interpretation and the legislative history of the statute do little to resolve this stand-off." *Id.* at 10a-11a. See *id.* at 10a-18a (analyzing those sources). The court ultimately chose to rely on "what the statute actually says." *Id.* at 18a.

The court reasoned that Section 3001(i) "mentions 'the treating, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among these activities *generating* a different waste product entirely." Pet. App. 18a. The court examined the statutory definitions of the quoted terms and ruled that they "exclude 'generation,' which is separately defined as 'the act or process of producing hazardous waste.' 42 U.S.C. § 6903(6)." *Id.* at 19a. It concluded:

There is no overlap whatsoever, then, between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

*Ibid.* The court accordingly held that "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." *Id.* at 20a.

Judge Ripple dissented. He stated that the court should affirm the judgment for the reasons set forth in *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991), which held that MWC ash from resource recovery facilities is exempt from regulation under Subtitle C. Pet. App. 21a.<sup>2</sup>

4. The City of Chicago petitioned for a writ of certiorari to resolve the conflict between the decisions of the Second and Seventh Circuits. Pet. in No. 91-1328. EDF agreed that the conflict should be resolved by this Court and did not oppose the petition. Resp. Br. in No. 91-1328. The Court thereafter issued an order inviting the Solicitor General to present the views of the United States. On September 18, 1992, while that invitation to the Solicitor General was outstanding, EPA Administrator William Reilly issued a memorandum to EPA Regional Administrators setting out EPA's interpretation of Section 3001(i). Pet. App. 41a-49a. The Reilly memorandum directed the Regional Administrators to treat MWC ash as exempt from hazardous waste regulation under Subtitle C of RCRA. *Ibid.* Thereafter, the Solicitor General suggested that the Court grant the petition, vacate the decision and remand the case to the Seventh Circuit for further consideration in light of EPA's directive. U.S. Amicus Br. in No. 91-1328. This Court followed that course and

<sup>2</sup> Because of the apparent conflict with the Wheelabrator decision, the court of appeals' opinion was circulated among all active circuit judges prior to release. No judge recommended rehearing en banc. See Pet. App. 5a n.\*



returned the case to the Seventh Circuit. *City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992).

5. After requesting and receiving statements of positions from petitioners and EDF, the court of appeals reinstated its previous decision. The majority held that the Reilly memorandum did not affect its analysis, because the statute's plain language was dispositive. Pet. App. 2a. Judge Ripple again dissented. He stated that an agency has an obligation to review and insure the reasonableness of its interpretations on a continuing basis. Judge Ripple concluded that Administrator Reilly's review of the "admittedly ambiguous issue" and his reassessment of the agency's "early pronouncements" were responsible agency actions and deserved "deferential review." *Id.* at 4a.

#### SUMMARY OF ARGUMENT

The United States submits that Section 3001(i) of RCRA is ambiguous with respect to regulation of MWC ash. Although petitioners and EDF both invoke the "plain language" of Section 3001(i), the statute does not speak directly to the issue presented here. Indeed, EPA, which is charged with administering RCRA, has grappled with that issue since the statute's enactment and has repeatedly urged Congress to clarify the matter. At the same time, all of the courts that have addressed the issue (except the divided panel below) have acknowledged that the statute is ambiguous. In these circumstances, the Court should give deference to "a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Administrator Reilly formally articulated EPA's interpretation in his 1992 directive to the Regional Administra-

tors, and that directive remains in force. The Court should therefore defer to the reasoned analysis contained therein. The directive sets out an interpretation that is consistent with the text and legislative history of Section 3001(i), that reconciles the statute and the agency's regulatory scheme, and that takes into account important policy and technical considerations that are within EPA's special expertise. Deference is no less appropriate merely because the Administrator's construction is not the only reasonable interpretation, it has evolved over time, and it could be revised again in light of further technological or policy considerations.

#### ARGUMENT

##### EPA'S INTERPRETATION OF SECTION 3001(i) IS ENTITLED TO DEFERENCE

##### A. Section 3001(i) Is Ambiguous With Respect To Regulation Of MWC Ash.

1. Petitioners and EDF each have contended throughout this litigation that the plain language of Section 3001(i) supports their respective positions. See Pet. App. 10a-11a. They are able to rely on the same text to support contradictory conclusions, because the statutory language is ambiguous with respect to the specific question at issue. Section 3001(i) states in relevant part:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if [certain conditions are satisfied].

42 U.S.C. 6921(i). That provision, which is captioned as a "clarification" of EPA's pre-existing household waste ex-



clusion, is amenable to at least two different constructions.

On the one hand, the provision can plausibly be interpreted to mean that if a facility is one that "recover[s] energy from the mass burning of municipal solid waste" and it satisfies the prescribed conditions, then the facility as a whole is entitled to a regulatory exemption with respect to any activity that, in the absence of the exemption, could constitute "treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). Under that construction, EPA's household waste exclusion, set out at 40 C.F.R. 261.4(b)(1), would continue to apply to the incineration residues, notwithstanding the facility's commingling of "household" and non-hazardous "commercial or industrial" waste. The facility would enjoy an exemption from RCRA Subtitle C regulation for actions taken in "treating, storing, disposing of, or otherwise managing" both the incoming waste streams and the MWC ash, which would continue to be subject to the household waste exclusion even after leaving the facility.

On the other hand, Section 3001(i) can be construed in a more restrictive sense to mean that the discrete aspects of the facility's energy recovery process specifically referenced in the statute—treatment, storage, disposal, and other management activities—do not include a non-referenced activity—such as the "generation" of hazardous waste. The facility would enjoy an exemption from RCRA Subtitle C regulation when "treating, storing, disposing of, or otherwise managing" any hazardous waste products that are present in the incoming waste streams, despite contractual controls established by the owner/operator of the facility. See 42 U.S.C. 6921(i)(2). But the facility would be subject to regulation under RCRA Subtitle C if the incineration process generates a new product—MWC ash—that qualifies as a hazardous waste.

2. Although one may debate the relative merits of the competing constructions, both are plausible and consistent with the statutory text. At bottom, "Congress has not directly addressed the precise question at issue"—whether the household waste exclusion, as clarified by Section 3001(i), applies to MWC ash. *Chevron U.S.C. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Indeed, the ambiguity in Section 3001(i) of RCRA is not unlike the one that this Court encountered in *Chevron*, where the question was whether the Clean Air Act's provisions regulating new or modified major stationary sources, 42 U.S.C. 7502(b)(6), should be applied on a plantwide or a component-by-component basis. See 467 U.S. at 839-840. As in *Chevron*, EPA has considered the matter "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Id.* at 863. And as in *Chevron*, EPA's interpretation has consequently evolved over time.

When EPA promulgated its 1980 household waste exclusion, it clearly envisioned that the regulatory exclusion would exempt incineration residue from Subtitle C regulation. EPA stated in the preamble to that regulation that it was excluding the entire household waste stream from regulation, observing:

Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste. \* \* \*

45 Fed. Reg. 33,099 (1980). EPA explained that such wastes, however, "must be transported, stored, treated and disposed of in accord with applicable State and federal requirements concerning management of solid waste (including any requirements specified in regulations under Subtitle D of RCRA)." *Ibid.*

Five years later, when EPA amended the household waste exclusion in response to Congress's enactment of Section 3001(i), EPA expressed doubt whether MWC ash should be excluded. EPA stated in the preamble to the amended regulation:

The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic [of hazardous waste]. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of nonregulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residues.

50 Fed. Reg. 28,725-28,726 (1985). The agency continued:

EPA believes that the principal purpose of section 3001[i] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

*Id.* at 28,726. See Pet. App. 30a n.4. Although those preamble passages are somewhat equivocal, they have been

widely viewed as indicating that if MWC ash "exhibits a characteristic of hazardous waste," *ibid.*, the ash is subject to RCRA's Subtitle C requirements.<sup>3</sup>

Since 1985, EPA officials have suggested that, in that respect, the analysis contained in the 1985 regulatory preamble may be incorrect and have urged Congress to clarify its intent.<sup>4</sup> Congress subsequently included a provision in

<sup>3</sup> EPA also stated, however, that the Hazardous and Solid Waste Amendments do not "impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28,726 (1985). EPA determined that "any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arose about the residues." *Ibid.*

<sup>4</sup> In 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response stated to a Senate subcommittee that "[t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C." *Resource Conservation and Recovery Act - Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works, 100th Cong., 1st Sess. 427-428 (1987)*. See Pet. App. 14a-15a. In 1988, the Administrator testified to a House subcommittee that "there is ambiguity within the law and I think the law should be clarified," but he also indicated that the Agency would not take action to clarify its interpretation of the law out of deference to Congress, which was at the time considering legislation to amend the provision. *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. 72 (1988)*. In 1989, EPA's Director of the Office of Solid Waste stated to a House subcommittee that EPA continued to follow the 1985 interpretation, but she noted that there is "substantial controversy surrounding that interpretation," "the law is ambiguous given it is silent with regard to treatment of ash under [Section 3001(i)]," and "it needs to be clari-



the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, stating:

For a period of 2 years [until November 15, 1992]  
 \* \* \* ash from solid waste incineration units burning  
 municipal waste shall not be regulated by the Admini-  
 strator of the Environmental Protection Agency pur-  
 suant to section 3001 of the Solid Waste Disposal Act.

§ 306, 104 Stat. 2584. Since enactment of that "moratorium" provision, however, Congress has taken no action to clarify whether it intends MWC ash to be exempt permanently from Subtitle C regulation, and has, as a body, remained silent on this controversy.<sup>5</sup>

In light of the considerable uncertainty surrounding the issue, the imminent termination of the two-year mora-

fied." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 33 (1989). See Pet. App. 13a-16a. See also *Wheelabrator*, 725 F. Supp. at 767-768.

<sup>5</sup> In the past several years, Congress has considered various proposals that would clarify how MWC ash should be regulated. In 1988, Congress considered legislation that would have required specific standards for facilities disposing of MWC ash. See 53 Fed. Reg. 33,314, 33,328 (1988). In 1988, a bill was introduced that would have allowed disposal of MWC ash in certain RCRA Subtitle D landfills which met additional requirements (the so-called "D Plus" approach). See *Municipal Incinerator Ash: Hearings on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988). See also Pet. App. 12a-13a. In the session that ended in 1992, Congress considered a bill that would have amended RCRA Subtitle D to establish a separate regulatory framework for MWC ash. See S. Rep. No. 301, 102d Cong., 2d Sess. 56-60 (1992). Various pertinent provisions have also been introduced in the current session and are currently pending before Congress. See H.R. 424, 103d Cong., 1st Sess. (1993); H.R. 2017, 103d Cong., 1st Sess. (1993); H.R. 2488, 103d Cong., 1st Sess. (1993).

torium, and Congress's failure to take legislative action, EPA issued a policy directive to clarify the agency's interpretation of Section 3001(i). See Pet. App. 41a-49a. Administrator Reilly's September 1992 memorandum, which was issued to all EPA Regional Administrators and made publicly available, announced EPA's decision under Section 3001(i) of RCRA "to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities \* \* \* as exempt from hazardous waste regulation under RCRA Subtitle C." *Id.* at 41a. That decision "supersede[d] the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation." *Id.* at 42a. The current Administrator has not revised or revoked that directive, and it therefore remains in effect and continues to bind the Regional Administrators.

As EPA's experience demonstrates, Section 3001(i) is amenable to more than one interpretation. Prior to the court of appeals' decision in this case, the courts that had examined the issue had concluded—in accord with the expert agency charged with administering the statute—that the statutory language is ambiguous as to the issue presented here. See Pet. App. 24a; *Wheelabrator*, 725 F. Supp. at 764, *aff'd*, 931 F.2d at 212. See also Pet. App. 4a (Ripple, J., dissenting). The Seventh Circuit is the *only* court to conclude that the statutory text is dispositive, and that divided court's reliance on the purported "plain language" seemingly arises from the court's own perplexity in attempting to resolve the issue, rather than from any compelling force in the statute's words. Indeed, the court conducted a preliminary analysis of the statute, its enactment, and EPA's implementation and stated:

What we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency. Where do we turn?



See Pet. App. 16a. The court then returned to the statutory text and concluded, on second thought, that it should adopt EDF's "plain language" argument, relying in part on "RCRA's policy." *Id.* at 18a-20a. But significantly, the court simplified its task by ignoring the alternative "plain language" argument — viz., petitioners are exempt because the facility enjoys an exemption from RCRA Subtitle C regulation for actions taken in "treating, storing, disposing of, or otherwise managing" both the incoming waste streams and the outgoing MWC ash. 42 U.S.C. 6921(i).

At bottom, the adversaries in this case can each invoke "plain language" in support of their competing interpretations, but neither can definitively refute the other party's construction. The court of appeals chose one "plain language" argument in preference to another, but the fact remains that Congress has not "directly spoken to" the precise question presented in this case. *Chevron*, 467 U.S. at 842. The statute ultimately is ambiguous with respect to the issue presented here. Compare *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991).

#### B. EPA's Interpretation Of Section 3001(i) Is Reasonable

1. This Court's decision in *Chevron* supplies the fundamental principle for resolving this case: A court interpreting an ambiguous provision of a statute administered by an agency must give deference to the agency's interpretation if that interpretation is "reasonable." *Chevron*, 467 U.S. at 844. See, e.g., *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2159 (1993); *United States v. Alaska*, 112 S. Ct. 1606, 1610 (1992); *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Rust v. Sullivan*, 111 S. Ct. at 1767; *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647-648 (1990); *Sullivan v. Everhart*, 494 U.S. 83, 88-89 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989).

As this Court has explained, "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury v. FLRA*, 494 U.S. 922, 933 (1990). "That is a task infused with judgment and discretion, requiring the 'accommodation of conflicting policies that were committed to the agency's care.'" *Ibid.* The principle of deference to administrative interpretations

has been consistently followed by this Court whenever a decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

*Chevron*, 467 U.S. at 844 (citations omitted).

Administrator Reilly's directive that Section 3001(i) exempts MWC ash from RCRA Subtitle C regulation is the expert agency's currently operative interpretation of an ambiguous provision of a complex statute. That directive attempts to reconcile the text of Section 3001(i), its legislative history, EPA's pre-existing regulatory program, and the underlying policies of RCRA, which include the goals of protecting the environment and promoting resource recovery from nonhazardous solid waste. See Pet. App. 42a-49a. Under *Chevron*, the proper inquiry now is whether the agency's interpretation "is based on a permissible construction of the statute." 467 U.S. at 842-843. See *Good Samaritan Hospital*, 113 S. Ct. at 2156; *Alaska*, 112 S. Ct. at 1610; *Rust*, 111 S. Ct. at 1759; *LTV Corp.*, 496 U.S. at 648; *Mead Corp.*, 490 U.S. at 722.

To answer that inquiry, a court should examine whether the agency's interpretation is "reasonable," *Pauley*, 111

S. Ct. at 2537, in the sense that it is "rational and consistent with the statute." *Everhart*, 494 U.S. at 89, quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). As this Court recently noted, "where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any reason not to defer to its construction." *Good Samaritan Hospital*, 113 S. Ct. at 2161. Indeed, that approach not only gives proper respect to the agency's congressionally assigned function, but it also assigns the courts to their proper role by directing disputes over policy to the politically accountable branches of government. See *Chevron*, 467 U.S. at 864-865. That approach is particularly appropriate here, where the statutory provision builds upon a pre-existing agency regulation.

2. EPA's interpretation of Section 3001(i) is manifestly rational. As the Reilly memorandum explains, Congress enacted Section 3001(i) to clarify EPA's 1980 household waste exclusion, which exempted household waste from Subtitle C regulation "in all phases of its management, [including] residues remaining after treatment (e.g., incineration, thermal treatment)." 45 Fed. Reg. 33,099 (1980). See Pet. App. 42a-43a. Section 3001(i) incontestably clarified that when a resource recovery facility processes household waste in combination with nonhazardous commercial and industrial waste and in compliance with prescribed requirements, the facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. 6921(i). See Pet. App. 43a-44a. It is not unreasonable to conclude that this "clarification" retains the basic thrust of EPA's pre-existing regulatory provision and continues to exempt the combined household and nonhazardous commercial and industrial waste from regulation "in all phases of its manage-

ment," including disposal of the resulting incineration residues.<sup>6</sup>

As the former Administrator's memorandum explains, his interpretation is entirely consistent with the statutory text. See Pet. App. 42a-43a. Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" reasonably suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues. The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes (see Pet. App. 19a-20a) does not undermine that conclusion. The absence of that term may simply reflect Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms Con-

<sup>6</sup> It is helpful to understand how EPA's RCRA regulations operate in this setting. Under those regulations, a person who generates solid waste "must determine if the waste is hazardous" by first "determin[ing] if the waste is excluded from regulation under 40 CFR 261.4." See 40 C.F.R. 262.11. A facility that incinerates waste, reducing it to ash, would find that "[h]ousehold waste, including household waste that has been \* \* \* treated [e.g., reduced to ash]" is excluded from regulation. 40 C.F.R. 261.4(b)(1). The question would arise, however, whether the household waste exclusion continues to apply when "household waste" is incinerated in combination with nonhazardous "commercial or industrial" waste. Section 3001(i) of RCRA—which EPA codified virtually verbatim into 40 C.F.R. 261.4(b)(1)—clarifies *that* point. The municipal facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if the prescribed conditions are met. See 40 C.F.R. 261.4(b)(1). Thus, the household waste exclusion continues to apply, and the resulting MWC ash remains exempt from hazardous waste regulation.



gress used. See RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment).<sup>7</sup> At most, Congress's silence on that point highlights the fact that Congress has "left a gap for the agency to fill." *Chevron*, 467 U.S. at 843-844. See Pet. App. 44a n.2.

The Reilly memorandum's interpretation of Section 3001(i) is especially plausible when the statute is viewed in its legal context. When Congress acted, it presumably was aware that EPA had interpreted the household waste exclusion to apply to such waste "in all phases of its management," including disposal of incineration residues. See 45 Fed. Reg. 33,099 (1980).<sup>8</sup> Congress did not question or overrule that interpretation when it clarified that the household waste exclusion would apply to a resource recovery facility that burns commingled wastes, and it is therefore reasonable for the Administrator to conclude that Congress ratified that interpretation. See *Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 111 S. Ct. 1503, 1508 (1991); *Traynor v. Turnage*, 485 U.S. 535, 545-546 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845-846 (1986); *FDIC v.*

<sup>7</sup> Significantly, Section 3001(i) employs terms similar to those that EPA had employed in its prior regulatory exclusion. Compare RCRA § 3001(i), 42 U.S.C. 6921(i) (facility shall not be deemed to be "treating, storing, disposing of, or otherwise managing hazardous wastes") with 40 C.F.R. 261.4(b)(1) (1982) (excluding household waste, including waste "that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused") and 45 Fed. Reg. 33,099 (1980) (excluding household waste "in all phases of its management").

<sup>8</sup> Cf. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

*Philadelphia Gear Corp.*, 476 U.S. 426 (1985). And to the extent the legislative history is relevant, it suggests that Congress intended to retain EPA's interpretation. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). See Pet. App. 44a-46a & nn.2-3.

The Reilly memorandum also is consistent with the objectives Congress sought to achieve in enacting Section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste. See Pet. App. 46a-48a. As in *Chevron*, "Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by th[is] case[ ]." 467 U.S. at 865. Based on EPA's scientific judgment and the safeguards the agency has instituted in implementing other provisions of RCRA, Administrator Reilly determined that those objectives "are best served by exempting MWC ash from hazardous waste regulation." Pet. App. 46a. That determination rests on "significant expertise" and "entail[s] the exercise of judgment grounded in policy concerns." *Pauley*, 111 S. Ct. at 2534. "In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Ibid.* See *Chevron*, 467 U.S. at 844-845, quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961).<sup>9</sup>

<sup>9</sup> EDF has mistakenly suggested that this approach is "unworkable and makes no sense," because Section 3001(i) does not provide a separate exemption for downstream parties that transport or dispose of the MWC ash. See EDF Br. on Petition 12 n.8, 16 n.10. Under the Administrator's interpretation, the household waste exclusion continues to apply to a qualifying facility's disposal products after they leave the facility. This approach is consistent with the basic thrust of the household waste exclusion, which Section 3001(i) was intended merely to clarify, as applying to exempted waste "in all phases of its



3. As this Court's decision in *Chevron* made clear, deference is appropriate even if the agency has changed its interpretation over time, provided that the agency supplies a reasoned basis for the change. "The fact that the agency has from time to time changed its interpretation \* \* \* does not \* \* \* lead us to conclude that no deference should be accorded the agency's interpretation of the statute." *Chevron*, 467 U.S. at 863. An agency's consistent adherence to a longstanding interpretation may provide an additional reason for deference, but it is not a *sine qua non* for respecting the agency's views. Compare, e.g., *Pauley*, 111 S. Ct. at 2575 (citing a consistent agency practice), with *Chevron*, 467 U.S. at 865 (citing other factors that support deference).

For example, it would provide no reason for a court to reject an agency's changed interpretation if practical experience or technological advances indicate that a revised interpretation is more consonant with congressional intent. Indeed, this Court recently ruled that an agency administrator is not "estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hospital*, 113 S. Ct. at 2161. As the Court explained:

"[A]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."

management," including disposal of the resulting incineration residues. See note 6, *supra* and accompanying text. Thus, a downstream transporter or disposer may continue to rely on the household waste exclusion when handling MWC ash.

*Ibid.*, quoting *NLRB v. Iron Workers*, 434 U.S. 335, 351 (1978) (other citations omitted). To be sure, the Court suggested that the weight that should be given to the agency's changed views "will depend on the facts of individual cases." 113 S. Ct. at 2161. But this Court has repeatedly accorded deference where, as here, the agency provides a reasoned justification for its changed position. E.g., *Rust*, 111 S. Ct. at 1769; *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539, 1546 (1991); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 335-336 (1989).

EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented in this case. See pp. 11-15 *supra*. The agency's contemporaneous interpretation of the 1985 rules codifying Section 3001(i) was replete with doubt as to Congress's intent. See 50 Fed. Reg. 28,725-28,726 (1985). EPA has always acknowledged that a statutory gap exists that must be filled, and it has searched for the best means to do so. The fact that the agency's understanding has evolved over time is no reason to deny deference to the current interpretation of the law in favor of the agency's earlier, less seasoned explication.

Indeed, EPA should not be discouraged from continuing to adjust its position as circumstances warrant. An agency should revise its views as necessary to reflect new learning that better informs the agency's interpretation of statutory provisions. As the Court has explained, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. Accord *Rust*, 111 S. Ct. at 1769; *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983),

citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).<sup>10</sup>

To be sure, an agency changing its course—even if it does not involve “rescinding a rule”—should “supply a reasoned analysis for the change.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42. In accordance with that principle, Administrator Reilly provided a reasoned explanation for the new policy. His directive to the EPA Regional Administrators explained that the interpretation is consistent with the text and legislative history of Section 3001(i). See Pet. App. 42a-43a. In addition, the directive addressed important policy considerations that are within EPA’s expertise. *Id.* at 46a-49a.

The directive explained that resource recovery from municipal solid waste “is an important component of EPA’s integrated waste management approach” that can “reduce the volume of waste that requires disposal” and may result in “recovering significant amounts of energy.” Pet. App. 47a-48a. The directive additionally noted that EPA had recently promulgated new criteria for municipal

<sup>10</sup> Thus, the courts of appeals have quite correctly held that a ruling by this Court upholding an agency’s interpretation as reasonable does not preclude the agency from subsequently changing its interpretation in light of additional knowledge or experience. See *International Ass’n of Bridge Workers, Local 3 v. NLRB*, 843 F.2d 770, 776 (3d Cir.), cert. denied, 488 U.S. 889 (1988); cf. *Mesa Verde Constr. Co. v. Northern Cal. District Council of Laborers*, 861 F.2d 1124, 1134-1136 (9th Cir. 1988). That approach is sound as an institutional matter. The expert agency that administers the statute is best equipped to revisit and fine tune regulatory programs on a nationwide basis in light of current knowledge, relieving Congress and the judiciary of the need repeatedly to reassess the details of very complicated technical or policy-laden matters. See Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 Administrative L.J. 255, 257-260 (1988).

solid waste landfills. 40 C.F.R. Pt. 258.<sup>11</sup> Those criteria contain many requirements that enhance the ability of regulated landfills to contain and manage MWC ash safely:

The Part 258 criteria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, groundwater monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure requirements.

Pet. App. 46a-47a. The knowledge that EPA gained through promulgation of the Part 258 criteria and the changed circumstances led it to reevaluate previous policy concerns and to conclude that “disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment.” *Id.* at 47a & n.5.

Thus, Administrator Reilly reviewed the pertinent law, evaluated the relevant policy considerations, applied the available data, and articulated a satisfactory explanation for his decision, providing a “‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). His analysis finds additional support in the rulemaking record

<sup>11</sup> EPA promulgated the Part 258 criteria in response to Section 4010(c) of RCRA, which directs EPA to reissue landfill criteria “for facilities that may receive hazardous household wastes or hazardous wastes from small quantity generators under [Section 3001(d)].” 42 U.S.C. 6949a(c). See *Sierra Club v. U.S. Environmental Protection Agency*, 992 F.2d 337 (D.C. Cir. 1993). The new Part 258 regulations require landfills to be designed and operated to meet criteria “necessary to protect human health and the environment,” taking into consideration “the ‘practicable capability’ of [such] facilities.” See 56 Fed. Reg. 50,983 (1991).



of the Part 258 criteria, which details the scientific, statistical, and statutory analyses supporting promulgation of the new landfill requirements. See 40 C.F.R. Pt. 258, 56 Fed. Reg. 50,978 (1991).<sup>12</sup>

4. Administrator Reilly's directive has not been repealed or superseded, and it therefore continues to state EPA's policy unless and until the agency revisits the issue. Nevertheless, EDF urged and the court of appeals concluded that the directive is not entitled to deference. They have given two reasons—apart from their mistaken reliance on the purportedly “plain” language of the statute, see pp. 9-16, *supra*—for disregarding the outstanding agency interpretation. Neither is persuasive.

First, EDF has contended that Administrator Reilly's directive is not entitled to deference, because the directive is comparable to an agency's “convenient litigating position.” Resp. Br. on Remand 6 n.2, quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). See also EDF Br. on Petition 16. That contention is manifestly wrong. Administrator Reilly's directive is a formal interpretation by an agency head that establishes current agency policy, has binding effect on subordinate agency officials, and is therefore a legitimate source for

<sup>12</sup> EPA has conducted additional studies on MWC leachate, using natural and synthetic lining materials commonly employed in the construction of municipal solid waste landfill liners. Those studies indicate that “with proper engineering considerations, carefully selected materials can be expected to perform as designed.” *Results of U.S. EPA Research on Municipal Waste Combustion*, Office of Research and Development, Cincinnati, Ohio (EPA March 1993, Draft). In addition, EPA is conducting ongoing, *in situ* studies of leachate from monofills receiving MWC ash. Those studies reveal concentrations of relevant metals within allowable limits. See AWD Technologies, *Municipal Waste Combustion, Ash and Leachate Characterization: Monofill—Fourth Year Study*, Woodburn Monofill, Woodburn, Oregon (March 1992).

*Chevron* deference. See *Bowen*, 488 U.S. at 212. Cf. *Alaska*, 112 S. Ct. at 1618-1619, citing *United States v. Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may establish policy “through administration of agency programs”).<sup>13</sup>

Second, the court of appeals concluded that Administrator Reilly's directive was not entitled to deference because EPA had changed its interpretation not just once, but several times. See Pet. App. 2a (“EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers.”); see also *id.* at 16a (referring to “[t]he see-sawing statements from the EPA”). That conclusion is erroneous as a factual matter. EPA has articulated a formal agency position interpreting Section 3001(i) only twice—in the preamble to the 1985 regulations and in Administrator Reilly's 1992 memorandum. Thus, the agency has changed its position on the statute's meaning only once.<sup>14</sup>

<sup>13</sup> EDF cannot accurately compare the Administrator's directive to a mere *pro hac vice* argument from agency counsel that has no independent force. Indeed, EDF's citation to *Bowen* is particularly inapt, because EPA is not a party to this suit and has participated as amicus curiae at this Court's invitation. The fact that Administrator Reilly issued his directive while this Court's invitation was pending provides no reason for denying deference. There is nothing inappropriate in an agency's providing formal regulatory guidance concerning issues that have given rise to litigation. Moreover, Administrator Reilly had an independent reason for providing clarification, because the congressional moratorium on agency regulation of MWC ash was scheduled to expire on November 15, 1992. See p. 14, *supra*.

<sup>14</sup> Statements that agency officials made to congressional committees advising the legislators of the agency's concerns and requesting clarification of Section 3001(i)'s ambiguous statutory language, see p. 13, *supra*, obviously do not constitute formal changes in agency policy.



But more fundamentally, a court is not entitled to ignore an administrative agency's interpretation simply because the agency has changed its mind—even if it has changed its mind several times. Indeed, this Court's decision in *Chevron* explicitly addresses that question:

The fact that the agency has from time to time changed its interpretation \* \* \* does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute.

467 U.S. at 863. The sole question is whether the Administrator has "amply justified his change of interpretation with a 'reasoned analysis.'" *Rust*, 111 S. Ct. at 1769. In this case, Administrator Reilly provided just such an analysis, and that currently outstanding interpretation is entitled to deference.

### CONCLUSION

The judgment of the court of appeals should be reversed.  
Respectfully submitted.

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AUGUST 1993

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OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

**October Term, 1992**

**CITY OF CHICAGO,**

*Petitioner,*

*against*

**ENVIRONMENTAL DEFENSE FUND, INC.,**

*Respondent.*

**WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

**BRIEF FOR AMICUS CURIAE STATE OF NEW YORK**

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**Dated: August 19, 1993**

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i.

### Question Presented

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes", exempts from hazardous waste regulation the ash produced from burning household and non-hazardous commercial and industrial solid waste at such a facility where the facility maintains in place procedures to assure that hazardous wastes are neither accepted at nor burned at the facility.



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iv.

**Citation of Opinions and Judgments Below**

The opinion of the Court of Appeals upon remand from this court is reported at 985 F. 2d 303. The initial opinion of the Court of Appeals is reported at 948 F.2d 345. The opinion of the District Court is reported at 727 F. Supp. 419.

No. 92-1639

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1992.

---

CITY OF CHICAGO,

*Petitioner,*

*against*

ENVIRONMENTAL DEFENSE FUND, INC.,

*Respondent.*

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**Brief for *Amicus Curiae* State of New York**

**Interest of the *Amicus Curiae***

The New York State Department of Environmental Conservation ("Department") estimates that, within several years, the waste-to-energy facilities in the State will annually produce approximately 1,500,000 tons of incinerator

ash. It is unclear what percentage of this ash would fail Toxicity Characteristic Leaching Procedure ("TCLP") testing, the new testing procedure adopted by the United States Environmental Protection Agency ("EPA"). If large quantities of incinerator ash must be placed in hazardous waste landfills, the Department is concerned that this will pose a heavy financial burden without significantly increasing the degree of environmental protection afforded by New York's current ash disposal methods.<sup>1</sup>

Given the volume of ash produced from municipal resource recovery facilities and the limited amount of space available in New York's commercial hazardous waste landfill (the only such landfill in the Northeast), the Department is also concerned that there will be insufficient space in that landfill for hazardous waste produced by industry if the ash produced from municipal resource recovery facilities must be placed in hazardous waste landfills. New York's "Capacity Assurance Plan", required under 42 U.S.C. § 9604(c)(9), the Superfund Amendments and Reauthorization Act, in order to maintain the State's ability to obtain federal funds for cleanup of hazardous waste sites, assured EPA that the State would have treatment or disposal facilities with adequate capacity for all hazardous wastes that are reasonably expected to be generated within the State during the next 20 years. The capacity of New York's hazardous waste landfill, which receives shipments of hazardous waste from generators in New York, many other states, and Canada, is 1.1 million cubic yards. In September of 1991, in conjunction with submission of the Capacity Assurance

<sup>1</sup>Vendors are claiming a new technology exists to render the ash non-hazardous. In the event this technology fails, however, the ash would, under the decision issued by the Seventh Circuit, be destined for hazardous waste landfills.

Plan to EPA, the Department imposed an annual ceiling of approximately 325,000 tons on the landfill.

Furthermore, a finding that such ash is not exempt from hazardous waste regulation would have serious financial implications for municipal solid waste landfills in the event they are deemed to be inactive hazardous waste sites. Over the last several years, ash from waste-to-energy facilities which incinerate municipal solid waste has been disposed of in municipal solid waste landfills throughout the nation.

The Department is also concerned that interpretation of Section 3001(i) to require handling the ash produced at municipal resource recovery facilities as hazardous waste will frustrate compliance with the State's solid waste management policy, codified in New York's Environmental Conservation Law ("ECL") § 27-0106, which identifies resource recovery as a management technique which may be preferable to landfills in some circumstances.

ECL § 27-0106, contained within New York's Solid Waste Management Act, provides, in pertinent part:

In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this section, establishes as its policy that:



1. The following are the solid waste management priorities in this state:

- (a) first, to reduce the amount of solid waste generated;
- (b) second, to reuse material for the purpose for which it was originally intended or to recycle material which cannot be reused;
- (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and
- (d) fourth, to dispose of solid waste that is not being reused, recycled, or from which energy is not being recovered, by land burial or other methods approved by the department.

\* \* \*

3. This policy, after consideration of economic and technical feasibility, shall guide the solid waste management programs and decisions of the department and other state agencies and authorities.

This policy was adopted after years of consideration and discussion among the State and its municipalities. Municipalities throughout the State have adopted local solid waste management plans which are consistent with the State's Solid Waste Management Act. Consequently, many local management plans prefer resource recovery over landfilling of raw waste, based upon local situations.

Since the incineration of raw municipal solid waste reduces its volume by 90% and weight by between 70% and 75%, landfilling all municipal solid waste without incineration would exacerbate New York's crisis in municipal solid waste landfill capacity.

The economic consequences of handling ash residue as hazardous waste would impose an enormous burden on the owner or operator of resource recovery facilities which would in turn be passed on to the public. Hazardous waste landfills are few, not centrally located, extremely expensive to reach and use, and short on capacity. Hazardous waste landfills are few because they are not only extremely expensive to construct and operate, but they are also extremely difficult to site in the first instance or to expand because of strong local opposition. New York's hazardous waste landfill is located in the Niagara area, 400 miles from where most of the State's population (and municipal waste) is located.

If resource recovery facilities are deemed to be "generators" of hazardous waste, each facility would be required to pay a \$40,000 annual generator fee if over 1,000 tons per year of ash residue must be managed as a hazardous waste. ECL § 72-0402(1)(d). In addition, the facility would have to pay a special assessment in the amount of \$27 per ton of residue requiring land burial at a hazardous waste disposal facility. Added to these costs are those associated with transportation and disposal. Disposal costs at the New York hazardous waste facility are estimated to be at least \$200 per ton. Typically, the transportation cost for ash residue originating in the downstate and Long Island areas, assuming a 400 mile transport, would be almost \$84 per ton. These additional transportation and disposal costs, which would be

borne by the public whose waste is incinerated at resource recovery facilities, are unnecessary from an environmental point of view since the special waste handling requirements now in effect in New York are adequate to protect the environment at significantly less cost.

Like a number of States, New York requires that the ash from municipal resource recovery facilities be managed, treated, and disposed of as a special waste in order to protect the environment.<sup>2</sup> This special waste management program, promulgated at Title 6 of the New York Code of Rules and Regulations, § 360-3.5, includes:

- ash must be stored inside a building
- transportation requirements include water-tight and leak-resistant containers or trucks;
- disposal must be as follows:
  - for fly ash only, disposal in a fly ash only landfill equipped with a double composite liner and leachate collection and leak detection systems above each composite liner

---

<sup>2</sup>All states, as of October 9, 1993, must comply with the minimum national landfill standards set forth in 40 CFR Part 258. Such standards include location restrictions (40 CFR §§ 258.10-258.16), operating criteria (40 CFR §§ 258.20-258.29), design criteria (40 CFR 258.40), groundwater monitoring and corrective action criteria (40 CFR §§ 258.50-258.58), closure and post-closure care (40 CFR §§ 258.60-258.61), and financial assessment criteria (40 CFR §§ 258.70-258.74). The regulations of many states, including those of New York, go beyond these minimum requirements.

- for combined ash or bottom ash, disposal in either an ash only landfill equipped with a single composite liner and leachate collection system or codisposal with municipal waste in a double composite lined landfill with leachate collection and leak detection systems above each composite liner
- for fly ash treated in such a way that it immobilizes the release of heavy metals under acidic and non-acidic conditions, codisposal with municipal waste in a double composite-lined landfill with redundant leachate collection and leak detection systems

Given these existing protective requirements for ash disposal, should the holding of the Seventh Circuit be held to be the law of the land, only a speculative or marginal enhancement of environmental protection would be gained, but it would be gained at an enormous cost to the public.

### Statement of the Case

On January 27, 1988, plaintiffs Environmental Defense Fund, Inc. and Citizens For A Better Environment (collectively referred to as "EDF") brought this suit asserting that the City of Chicago violated provisions of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, because it failed to handle the ash produced at the Northwest Facility, a municipal solid waste incinerator, as a hazardous waste pursuant to RCRA.

RCRA, which deals with the generation, treatment, storage, transportation, and disposal of hazardous and non-hazardous waste, was enacted in 1976. Subtitle C of RCRA

requires EPA to identify and list hazardous wastes and to promulgate standards governing hazardous waste generators and transporters and owners and operators of hazardous waste treatment, storage, and disposal facilities. Waste must be treated as hazardous if it is a "listed" hazardous waste, i.e., it is a waste listed in the regulations, or, if it is not listed but it exhibits the "characteristics" of hazardous waste. The "characteristics" are four: ignitability, corrosivity, reactivity, or toxicity. These are specifically defined. If it is a hazardous waste, the waste is subject to stringent regulation under Subtitle C of RCRA. If not, it is regulated by the less stringent, and therefore far less expensive, provisions of Subtitle D.

If the ash produced at a resource recovery facility is regulated as a hazardous waste, the facility would be required to handle the ash as a hazardous waste, that is, obtain a permit to store it as a hazardous waste in special storage facilities replete with extensive pollution prevention devices and procedures, manifest it (provide a cradle to grave paper trail of its movement), and arrange for transport via a permitted hazardous waste transporter for eventual disposal at a hazardous waste landfill.

The 1976 RCRA statute did not explicitly deal with municipal or household waste and whether such waste or ash produced from its incineration is hazardous. In 1978, however, in draft regulations, EPA proposed the "household waste exclusion" to exempt household waste from regulation as a hazardous waste. EPA took the position that RCRA's legislative history indicated that Congress did not intend that the type of waste substances normally used in households be subjected to regulation under RCRA, and therefore households, apartment houses, condominiums,

and hotels were not subject to regulation under RCRA. The final rule, promulgated in 1980, adopted the household waste exclusion. In support of its position, EPA maintained that Congress intended to exclude the household waste-stream from regulation as a hazardous waste under Subtitle C, and therefore it retained its exempt status even through eventual conversion into ash.

In 1984, Congress adopted the Hazardous and Solid Waste Disposal Amendments to RCRA and included a specific provision entitled, "Clarification of Household Waste Exclusion":

3001(i). [42 U.S.C. § 6921(i)] Clarification of Household Waste Exclusion.

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and



(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

In bringing this lawsuit, EDF asserted, and the City did not deny, that the ash produced at the facility contains levels of lead and cadmium that exceed the legal thresholds defining wastes as hazardous. The City did assert, however, and EDF accepted, that the facility only accepted household and non-hazardous commercial and industrial waste, and that the facility had in place procedures designed to ensure that no hazardous wastes were accepted or burned at the facility.<sup>3</sup> Based on these facts, the City asserted that it was exempted from the requirements of Subtitle C of RCRA, which regulates generators of hazardous wastes, because it therefore came within the exemption contained within 42 U.S.C. § 6921(i) [Section 3001(i) of RCRA], enacted in 1984.

The district court entered judgment in favor of the City on August 20, 1990. The United States Court of Appeals for the Seventh Circuit reversed and entered judgment for the plaintiffs on November 19, 1991.

<sup>3</sup>EDF asserted, and the City does not deny, that heavy metals, including cadmium and lead, those detected at the City's facility, are produced during incineration of non-hazardous waste because metal does not burn but becomes concentrated when the other constituents in the waste are burned.

On November 16, 1992, this Court granted defendants' petition for certiorari, vacated the judgment, and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the memorandum of the Administrator of the Environmental Protection Agency, dated September 18, 1992, regarding exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under RCRA Section 3000(i).

Upon the remand from this Court, the Court of Appeals for the Seventh Circuit entered an unpublished order on January 12, 1993 and again reversed the district court. The court of appeals issued a published decision on January 29, 1993. This Court then granted the second petition for a writ of certiorari.

### Summary of the Argument

This Court should reverse the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case and follow the decision issued in 1991 by the Court of Appeals for the Second Circuit in *Environmental Defense Fund, Inc., v. Wheelabrator Technologies, Inc.*, 931 F.2d 211, *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 453, 116 L.Ed.2d 471 (1991). The Second Circuit held that when Congress enacted Section 3001(i) of the Hazardous and Solid Waste Amendments Act in 1984, Congress consciously exempted resource recovery facilities burning household waste and commercial and industrial non-hazardous waste from the requirements of Subtitle C, which regulates hazardous waste, provided that the facilities maintained in place procedures to assure that hazardous wastes were not accepted at or burned at the facility. Thus, Congress knowingly ratified EPA's previously announced inter-

pretation of RCRA as including a general exemption of household waste from the requirements of Subtitle C of RCRA, *and* extended the exemption to include facilities burning non-hazardous commercial and industrial waste, provided that the facility maintains in place procedures to assure that hazardous waste is neither accepted at or burned at the facility.

### ARGUMENT

#### **Ash From Resource Recovery Incinerators That Burn Household Waste And Non-Hazardous Industrial/Commercial Waste Is Exempt From Regulation As A Hazardous Waste Under Subtitle C Of The Resource Conservation And Recovery Act**

In 1991, the United States Court of Appeals for the Second Circuit correctly decided the issue presented to this Court in this case. *Environmental Defense Fund, Inc., v. Wheelabrator Technologies, Inc.*, 931 F.2d 211, *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 453, 116 L.Ed.2d 471 (1991). In that case, the Second Circuit held that when Congress enacted Section 3001(i) of the Hazardous and Solid Waste Amendments Act in 1984, Congress consciously exempted resource recovery facilities burning household waste and commercial and industrial non-hazardous waste from the requirements of Subtitle C, which regulates hazardous waste, provided that the facilities maintained in place procedures to assure that hazardous wastes were not accepted at or burned at the facility. Thus, Congress knowingly ratified EPA's previously announced interpretation of RCRA as including a general exemption of household waste from the requirements of Subtitle C of RCRA, *and* extended the exemption to include facilities burning non-hazardous commercial and industrial waste,

provided that the facility maintains in place procedures to assure that hazardous waste is neither accepted at nor burned at the facility. This Court should reverse the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case and instead follow the 1991 decision by the Court of Appeals for the Second Circuit.

In that case, as here, EDF argued that the ash produced during the incineration process made the resource recovery facility a "generator" of hazardous wastes, and thus made the facility subject to RCRA Subtitle C's regulatory requirements for generators because Section 3001(i) did not mention an exemption for those generating hazardous wastes at such facilities. Like the City in this case, the defendant in that case, Wheelabrator Technologies, argued that the facility was a "manager" of hazardous wastes and Section 3001(i) expressly exempted municipal facilities "otherwise managing" hazardous wastes from Subtitle C's regulatory requirements.

In making its decision in 1991, the Second Circuit adopted the reasoning used by the United States District Court for the Southern District, where the case had originated. 725 F. Supp. 758. The district court found that the amendment was ambiguous on its face and that the meaning of the term "otherwise managing hazardous wastes" was not ascertainable without turning to the legislative history. 725 F. Supp. at 764.

The district court in the *Wheelabrator* case relied heavily on the Report prepared by the Senate Committee on the Environment and Public Works, which was prepared contemporaneously with the proposed Section 3001(i) and which accompanied the amendment in its travels through the legislative process. The district court properly chose not



to rely on statements made by legislators some years after the amendment was enacted urging a different legislative intent. 725 F. Supp. at 769-770.

The Senate Committee report provided context for the amendment and specifically used the term "generator", upon which EDF placed so much emphasis. 725 F. Supp. at 765. That report stated:

The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources, other than "households", including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New Section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a *resource recovery facility* which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

*All waste management activities* of such a facility, including the *generation*, transportation, treatment, storage and disposal of *waste* shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

*EDF, Inc. v. Wheelabrator*, 725 F. Supp. at 765, quoting S. Rep. No. 284, 98th Cong., 2d Sess., at 61 (1983). (Emphasis supplied by district court.) The limitations in paragraphs (1) and (2) referred to are the limitations found in Section 3001(i), specifically that the facility accepts only household wastes and/or commercial or industrial non-hazardous waste, does not accept hazardous wastes from any source, and has in place procedures to assure that hazardous wastes are not received at or burned at the facility.

The court found that the Senate Report clearly expressed Congress' intent that ash "generated" during the incineration process was exempted from Subtitle C's requirements, provided that the facility did not accept hazardous waste and has in place appropriate mechanisms to ensure that no such waste is accepted. 725 F. Supp. at 765. The court found that the legislative history "makes clear that at the time of its passage, Congress intended Section 3001(i) to exempt ash from regulation under Subtitle C *in order to pave the way for increased use of the resource recovery process*". 725 F. Supp. at 770. (Emphasis added.)

The Senate-House Conference Committee adopted, without change, the version proposed by the Senate. 725 F. Supp. at 765, citing H.R. Conf. Rep. No. 1138, 98th Cong., 2d Sess. 79, 106 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5576, 5649, 5677. The Conference Committee Report stated that:



The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

725 F. Supp. 765. The Senate version was adopted intact by the Congress. 725 F. Supp. at 765.

As the district court pointed out, Congress clearly knew that EPA had in 1980 interpreted the statute as exempting household waste, "and had it disagreed, it would have made clear its disagreement". 725 F. Supp. at 765. "Instead", continued the court, "Congress clarified its 'original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.'" 725 F. Supp. at 765-766, quoting Senate Report No. 284 at 61.

The district court in *EDF v. Wheelabrator* also properly rejected EDF's argument, accepted by the majority of the Seventh Circuit, that the exemption contained in Section 3001(i) merely exempted facilities from regulations governing managing hazardous wastes (i.e., treatment, storage, or disposal) but not from regulations governing generating of hazardous wastes, reasoning that it was difficult to understand what, if any, benefit the facility would derive from such an exemption because a facility which did not accept or burn hazardous wastes would not be subject to regulation as a treatment, storage, or disposal facility even in the absence of the exemption. 725 F. Supp. at 763. We believe that Seventh Circuit's limited reasoning of the "managing" exemption should be rejected.

## Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: August 19, 1993

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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THE CITY OF CHICAGO, *et al.*,

*Petitioners,*

vs.

ENVIRONMENTAL DEFENSE FUND, *et al.*,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF OF THE COUNTY OF WESTCHESTER,  
NEW YORK AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS**

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No. 92-1639

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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THE CITY OF CHICAGO, *et al.*,

*Petitioners,*

vs.

ENVIRONMENTAL DEFENSE FUND, *et al.*,*Respondents.*


---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF OF THE COUNTY OF WESTCHESTER,  
NEW YORK AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

Amicus is the County of Westchester  
and its taxpayers residing in

Westchester County Refuse District No. 1\* which have a direct interest in the outcome of this Court's ruling on the issue of whether ash residue generated by resource recovery facilities such as the County of Westchester's Charles Point Resource Recovery Facility in Peekskill, New York is subject to regulation as a hazardous waste under Section 3001(i) of the Resource

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\*The Westchester County Refuse District No. 1 was established pursuant to New York County Law Article 5-A and formed in 1982 by Resolution No. 227-1981 of the Westchester County Board of Legislators and approved by the voters at a referendum (see Matter of Crell v. O'Rourke, 88 A.D.2d 83 (2d Dep't 1982) aff'd, 57 N.Y.2d 702 (1982)). The District was established as a means of financing the operating costs of a resource recovery facility in the County. The District also owns and operates an ashfill known as the Sprout Brook Residue Disposal Site located in Cortlandt, New York where the Charles Point facility's ash is brought for disposal.

Conservation and Recovery Act (RCRA), 42 U.S.C. §6921(i). See Appendix, infra, for text of statute.

The Charles Point Resource Recovery Facility\*, the construction of which was authorized by Resolution No. 28-1979 of the Westchester County Board of Legislators and financed by approximately \$200 million dollars in bonds issued for the facility's construction, was the very resource recovery facility at issue in Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F.Supp 758 (S.D.N.Y. 1989) aff'd, 725 F.2d 758 (2d. Cir. 1991) cert den, 112

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\*The Charles Point Resource Recovery Facility is currently operated by Westchester Resco, L.P., which is a subsidiary of Wheelabrator Technologies, Inc. Resco designed the facility pursuant to a 1981 agreement entered into by the County of Westchester and Wheelabrator-Frye, Inc. a predecessor of Wheelabrator Technologies, Inc.



S.Ct. 453 (1991). In that case, the United States Court of Appeals for the Second Circuit unanimously rejected the identical contention at bar brought by the very party before this Court, the Environmental Defense Fund, Inc. and ruled that incinerator ash is exempt from regulation under Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901-6992k.

The County of Westchester urges that this Court reverse the United States Court of Appeals for the Seventh Circuit's overly narrow and strained majority ruling in City of Chicago, et al. v. Environmental Defense Fund, Inc. and adopt the position and reasoning articulated by the Second Circuit and by the United States Environmental Protection Agency (EPA) that incinerator ash is exempt from regulation under

Subtitle C of RCRA.

An adverse decision by this Court finding that ash from the thermal reduction of solid waste is subject to regulation as a hazardous waste under Subtitle C of RCRA would have significant financial consequences for taxpayers residing within Westchester County Refuse District No. 1, as well as for presently over 128 other operating resource recovery facilities, four facilities under construction and an estimated 42 facilities in planning throughout the United States. See Solid Waste and Power, Energy-from-Waste 1988 Activity Report i (1993).

SUMMARY OF ARGUMENT

The decision of the majority of the United States Court of Appeals for the Seventh Circuit in City of Chicago, et al. v. Environmental Defense Fund, Inc. declaring ash remaining after the incineration of municipal solid waste at a resource recovery facility as subject to hazardous waste regulation under Subtitle C of RCRA is clearly wrong. In so ruling, the Seventh Circuit's opinion misconstrues the plain language of Section 3001(i) of RCRA, ignores the law's legislative history, purpose and intent and cavalierly casts aside any deference to the EPA's interpretations concerning this issue in disregard of this Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Indeed, the Seventh Circuit's strained

construction of the "plain language" of Section 3001(i) patently countermands, in toto, the policy considerations of Congress to encourage the development of resource recovery facilities as a major means of addressing this nation's mounting solid waste disposal crisis. In essence, an affirmance of the Seventh Circuit's decision by this Court will pose a tremendous economic burden upon municipalities who already face serious fiscal problems.

ARGUMENT

THIS COURT SHOULD REJECT THE  
ERRONEOUS DECISION OF THE  
SEVENTH CIRCUIT AT BAR AND  
ADOPT THE SECOND CIRCUIT'S  
RATIONALE IN WHEELABRATOR AND  
EPA INTERPRETATIONS CONCLUDING  
THAT SECTION 3001(i) OF RCRA  
EXEMPTED ASH REMAINING AFTER  
INCINERATION OR THERMAL  
TREATMENT OF MUNICIPAL SOLID  
WASTE AT A RESOURCE RECOVERY  
FACILITY FROM REGULATION AS A  
HAZARDOUS WASTE

A. Plain Language of Section 3001(i)  
of RCRA Belies the Seventh Circuit's  
Statutory Construction

The majority of the Seventh Circuit's  
holding in City of Chicago v Environ-  
mental Defense Fund that the "plain lan-  
guage" of Section 3001(i) of RCRA  
subjects the ash remaining from the  
burning of municipal waste to Subtitle C  
regulation is "plainly" wrong. The  
Court's narrow and sole reliance on the

absence of the word "generation" in  
Section 3001(i) to support its position  
ignores the general broad scope of  
Section 3001(i) which exempts the  
activities of a resource recovery  
facility from all hazardous waste  
regulation - those governing "treating,  
storing, disposing of or otherwise manag-  
ing" waste. Subtitle C of RCRA as a  
whole is even captioned "HAZARDOUS WASTE  
MANAGEMENT". The statutory definition  
of hazardous waste "management" contain-  
ed in 42 U.S.C. §6903(7) includes "all  
storage, transportation, processing,  
treatment, recovery and disposal of  
hazardous wastes." (emphasis added).  
The term "treatment" is further defined,  
in pertinent part, as any method,  
technique, or process... designed...so  
as to render such waste...reduced in  
volume." 42 U.S.C. §6903(34).

A plain reading of these terms clear-



ly encompasses producing and then handling and disposing of ash. The majority of the Seventh Circuit's statutory construction of these terms to the contrary runs counter to the plain meaning of Section 3001(i) which indicates that resource recovery facilities are exempt from the requirements of Subtitle C because they do not treat or "manag[e] hazardous wastes."

**B. The Legislative History, Purpose and Intent of Section 3001(i) of RCRA Clearly Support the Second Circuit's Opinion in Wheelabrator**

Even assuming, arguendo, Section 3001(i) were ambiguous, the majority of the Seventh Circuit's decision at bar is still erroneous. As a unanimous Second Circuit correctly declared in Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F. Supp. 758 (S.D.N.Y. 1989) aff'd., 931 F.2d 211 (2d Cir. 1991) cert den. 125 Ct

453 (1991), the legislative history of the 1984 clarification of the EPA's 1980 regulatory household waste provision (45 Fed. Reg. 33,120 (May 19, 1980) codified as amended at 40 C.F.R. §261.4(b)(1) (1987)) makes crystal clear Congress' intent to exclude ash generated by an excluded facility from regulation under Subtitle C of RCRA. In so ruling, the Wheelabrator Courts looked to the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation and commented on Section 3001(i) and stated in, pertinent part:

New section 3001(d)[sic] to section 3001 clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources. All waste management activities of such a facility,

including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion...

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). See also, Wheelabrator, 725 F. Supp at 765.

Furthermore, Section 3001(i) is a clarification of the EPA's Household Waste Exclusion, "a previously existing regulatory exclusion which clearly extended to ash". Wheelabrator, 725 F.Supp at 765.

As Judge Haight, United States District Court Judge for the Southern District of New York, aptly observed in Wheelabrator:

Nowhere in the 1984 exclusion, nor in the Committee report which accompanied it, is there any hint of a congressional intent to limit the scope of

that earlier exclusion. EDF argues that the ash resulting from the incineration of household waste remains exempt from regulation under Subtitle C, pursuant to the 1980 exclusion, but that ash generated by a facility that accepts municipal as well as household waste is not so exempt. I do not think that a fair reading of the statute. More important, neither, according to its declarations, would Congress.

Congress clearly knew of the EPA's interpretation of the 1980 regulation and had it disagreed, would have made clear its disagreement. See Young v Community Nutrition Institute, 476 U.S. 974, 983, 106 S. Ct. 2360, 2365, 90 L. Ed. 2d 959 (1986) (quoting NLRB v. Bell Aerospace, Co., 416 U.S. 267, 275, 94 S. Ct. 1757, 1762, 40 L. Ed. 2d 134 (1974)) ('congressional failure to revise or repeal the agency's interpretation is the one intended by Congress'). Instead Congress clarified its 'original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources'. Senate Report at 61.

Wheelabrator, 725 F. Supp at 765-66.

Clearly, Congress' interest and purpose in enacting Section 3001(i) was to encourage energy recovery. The legislative history brings to light that at the time of its passage, Congress intended Section 3001(i) to exempt ash from regulation under Subtitle C in order "to pave the way for increased use of the resource recovery process". See Wheelabrator, 725 F. Supp at 770.

If the majority of the Seventh Circuit's view is adopted by this Court that Section 3001(i) subjects the ash remaining from the burning of municipal waste to Subtitle C regulation, Section 3001(i) essentially provides no regulatory relief for resource recovery facilities because it fails to exempt such facilities from one of the most burdensome regulatory restrictions. See, Wheelabrator, 725 F. Supp. at 763 n. 12

(if ash is not exempt from regulation as a hazardous waste, "it is difficult to understand what, if any, benefit the Facility derives from the exemption.") Clearly, the majority of the Seventh Circuit's decision at bar, undermines the primary purpose of Section 3001(i) and accordingly should be rejected by this Court.

**C. EPA'S Interpretation Should Be Accorded Deference by this Court**

On September 18, 1992, the Administrator of the EPA issued a memorandum clearly articulating the EPA's determination that under Section 3001(i) of RCRA, the ash generated from the combustion of municipal solid waste at resource recovery facilities should be treated as exempt from hazardous waste regulation under Subtitle C of RCRA. (See Appendix to Petitioner's Petition for a Writ of Certiorari at pp. 41a-49a).



After this Court remanded the Seventh Circuit's judgment affording that Court the opportunity for reconsideration in light of the EPA's determination, the same majority of the Seventh Circuit by an opinion dated January 29, 1993 (See, Appendix to Petitioners' Petition for a Writ of Certiorari at p. 1a-4a) patently refused to defer to the reasonable interpretation of Section 3001(i) reached by the EPA, the very agency charged with the administration of RCRA.

It is submitted that such view boldly disregarded this Court's holding in Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) to defer to the reasonable interpretation of the agency charged with the administration of the statute. As Seventh Circuit Judge Ripple cogently noted in his dissenting opinion, notwithstanding the varying interpretations

given Section 3001(i) of RCRA by the EPA in the past, this Court emphasized in Chevron, 467 U.S. at 863, that "[a]n initial agency interpretation is not instantly carved in stone" and that an "agency has the continuing obligation to ensure that its interpretation is reasonable by considering varying interpretations and the wisdom of its policy on a continuing basis" Chevron, 467 U.S. at 863-64. (See Appendix to Petitioner's Petition for a Writ of Certiorari at pp. 3a-4a). Furthermore, revised agency interpretations should also be accorded deference. Rust v Sullivan, 111 S. Ct. 1759, 1769 (1991).

**D. Policy Considerations Support  
Finding by this Court for  
Exemption of Ash as Hazardous  
Waste Under Subtitle C of RCRA**

Finally, an affirmance by this Court of the strained and overly narrow construction of the "plain language" of

Section 3001(i) of the RCRA by the majority of Seventh Circuit, undermines the development and use of resource recovery facilities which clearly is at odds with Congress' intention to encourage "commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284 at 61. Indeed, Congress' election reflected in Section 3001(i) to exclude the waste management activities of resource recovery facilities from hazardous waste regulations under Subtitle C was intended to promote resource recovery as one of the major solutions to this nation's emerging solid waste disposal crisis.

If the Seventh Circuit's statutory construction of Section 3001(i) is affirmed by this Court, the implications

are severe. Such a ruling could significantly deter the development of additional resource recovery facilities and cause tremendous economic hardships upon municipalities and their taxpayers who presently rely upon such facilities, by dramatically escalating operating costs. Recent EPA data demonstrate that the cost of disposal in a hazardous waste (Subtitle C) landfill is ten times the cost of disposal of a non-hazardous waste (Subtitle D) landfill. See EPA Memorandum dated September 18, 1992 from William Reilly at pp. 48a-49a as set forth in the Appendix to Petitioners' Petition for Writ of Certiorari.

Aside from the serious financial costs of managing ash as hazardous waste, hundreds of communities will encounter troublesome enforcement consequences as well. The Seventh Circuit's decision, if affirmed, will be a monumental setback and will undermine

carefully designed solid waste management plans for municipalities throughout the United States, including the County of Westchester, that have turned to resource recovery as an environmentally sound method for municipal solid waste management.


CONCLUSION

For the foregoing reasons, the County of Westchester, New York as amicus respectfully requests this Court adopt the position and reasoning of the United States Court of Appeals for the Second Circuit espoused in Wheelabrator and by the United States EPA and rule that ash is exempt from hazardous waste regulation under Subtitle C of RCRA and reverse the decision of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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## APPENDIX

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. §6921(i).

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if —

(1) such facility —

(A) receives and burns only —

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF BARRON COUNTY, WISCONSIN,  
BROWARD COUNTY, FLORIDA, CITY OF AKRON, OHIO,  
CITY OF ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA,  
CITY OF HARRISBURG, PENNSYLVANIA, CITY OF  
INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA,  
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AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE  
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AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA,  
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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1639

THE CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
Respondents.

**On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit.**

**BRIEF AMICI CURIAE OF BARRON COUNTY, WISCONSIN,  
BROWARD COUNTY, FLORIDA, CITY OF AKRON, OHIO,  
CITY OF ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA,  
CITY OF HARRISBURG, PENNSYLVANIA, CITY OF  
INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA,  
CONCORD REGIONAL SOLID WASTE/RESOURCE RECOVERY  
COOPERATIVE, COUNTY BOARD OF ARLINGTON, VIRGINIA,  
DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY  
RECOVERY SPECIAL SERVICE DISTRICT, DELAWARE  
COUNTY SOLID WASTE AUTHORITY, FAIRFAX COUNTY,  
VIRGINIA, GREATER DETROIT RESOURCE RECOVERY  
AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE  
HAMPTON/NASA/USAF REFUSE-FIRED STEAM  
GENERATING FACILITY, METROPOLITAN GOVERNMENT  
OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,  
MINNESOTA RESOURCE RECOVERY ASSOCIATION,  
MUNICIPAL WASTE MANAGEMENT ASSOCIATION, NEW  
HANOVER COUNTY, NORTH CAROLINA, NORTHEAST  
SOLID WASTE COMMITTEE, RESOURCE AUTHORITY  
IN SUMNER COUNTY, TENNESSEE, SOLID WASTE  
ASSOCIATION OF NORTH AMERICA, SOLID WASTE  
AUTHORITY OF CENTRAL OHIO, SOLID WASTE DISPOSAL  
AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA,  
SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF  
VIRGINIA, ST. CROIX COUNTY, WISCONSIN, TOWN OF  
HEMPSTEAD, NEW YORK, TULSA AUTHORITY FOR  
RECOVERY OF ENERGY AND CITY OF TULSA, OKLAHOMA,  
AND YORK COUNTY SOLID WASTE AND REFUSE  
AUTHORITY IN SUPPORT OF PETITIONERS**

This brief *amici curiae* is submitted in support of petitioners City of Chicago, *et al.* *Amici* believe that the decision below, *Environmental Defense Fund, Inc. v. City of Chicago*, 985 F.2d 303 (7th Cir. 1993), which concluded that ash residue from the operation of waste-to-energy, resource recovery facilities is subject to the hazardous waste management standards of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939 (1988), contradicts the plain meaning and legislative intent of section 3001(i) of RCRA, 42 U.S.C. § 6921(i), and is antithetical to the objectives and policies of RCRA as a whole.<sup>1</sup> As such, the decision undermines the carefully designed solid waste management plans of local governments throughout the United States and poses a serious obstacle to sound management of the Nation's growing municipal solid waste stream.

The petitioners and respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

#### STATEMENT OF INTEREST OF AMICI

*Amici* include cities, counties, local government agencies and organizations who have primary responsibility for managing the growing solid waste crisis that confronts our Nation. See U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-89-019 (February 1989) (cited below as "*Agenda For Action*"). Meeting that responsibility has required *amici* and their constituents to balance carefully all of the public health, environmental and economic concerns involved in managing the municipal waste stream.

<sup>1</sup> The decision of the Seventh Circuit was entered following this Court's order vacating the initial court of appeals' decision in this matter. *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992) (Circuit Judge Ripple dissented in both instances).

That is the context in which *amici* have focused on the development of resource recovery facilities as a very important solid waste management tool.

In some instances, *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Akron, Ohio; Alexandria, Virginia; Ames, Iowa; Arlington, Virginia; Barron County, Wisconsin; Broward County, Florida; Fairfax County, Virginia; Harrisburg, Pennsylvania; Hempstead, New York; Indianapolis, Indiana; Nashville, Tennessee; New Hanover County, North Carolina; St. Croix County, Wisconsin; and Tampa, Florida). Other *amici* are local government agencies and special authorities (Concord Regional Solid Waste/Resource Recovery Cooperative; Davis County Solid Waste Management and Energy Recovery Special Service District (Utah); Delaware County Solid Waste Authority (Pennsylvania); Greater Detroit Resource Recovery Authority; Joint Board of Oversight, Hampton/NASA/USAF Refuse-Fired Steam Generating Facility (Virginia); Resource Authority in Sumner County, Tennessee; Solid Waste Authority of Central Ohio; Solid Waste Disposal Authority of the City of Huntsville, Alabama; Southeastern Public Service Authority of Virginia; Tulsa Authority for Recovery of Energy and City of Tulsa, Oklahoma; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (Massachusetts)).<sup>2</sup>

<sup>2</sup> The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing governmental functions concerning waste management on behalf of the following Massachusetts communities: Acton, Andover,



*Amici* also include national and regional organizations concerned with solid waste management. *Amicus* Municipal Waste Management Association (MWMA) is a national membership association of solid waste professionals who are responsible for comprehensive solid waste management systems within local government. Formed in 1982 to address our cities' municipal solid waste management needs (MWMA is affiliated with The United States Conference of Mayors), the MWMA brings together local governments and other organizations with a common interest in municipal solid waste management through reduction, recovery, reuse and recycling of materials and energy from the waste stream. *Amicus* Solid Waste Association of North America (SWANA) is a non-profit educational organization serving individuals and communities that manage and operate municipal solid waste management systems. SWANA's 5,000 members are primarily municipal, county and regional public officials who are responsible for municipal solid waste management systems, but also include private sector companies that provide equipment and consulting services in the field of municipal solid waste management. Another of the *amici*, the Minnesota Resource Recovery Association, is an association consisting primarily of public entities working with the private sector in the development,

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Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wenham, Westford, West Newbury, Wilmington and Winchester. The Concord Regional Solid Waste/Resource Recovery Cooperative is a non-profit cooperative corporation formed for the purpose of providing municipal solid waste management for the following New Hampshire communities: Allenstown, Andover, Belmont, Boscawen, Bow, Bradford, Bristol, Canterbury, Concord, Deering, Dunbarton, Franklin, Gilford, Gilmanton, Henniker, Hill, Hillsborough, Hopkinton, Laconia, Loudon, Northfield, Pembroke, Salisbury, Tilton, Warner, Weare and Webster.

ownership and operation of resource recovery facilities and other types of waste management facilities.<sup>3</sup>

Resource recovery facilities are key components of the integrated waste management plans that *amici* and many other local governments throughout the United States are pursuing (integrated waste management means the complementary use of several waste management methods—source reduction, reuse and recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economical manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. See 42 U.S.C. § 6903(24).<sup>4</sup> These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as non-hazardous waste consistent with the requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by RCRA's hazardous waste management standards are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 142 resource recovery facilities

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<sup>3</sup> The Minnesota Resource Recovery Association represents waste-to-energy facilities serving the Minnesota counties of Anoka, Beltrami, Benton, Carver, Cass, Clay, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Hubbard, Itasca, Mahnommen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin, and the Minnesota cities of Red Wing and Fergus Falls. Other members of the Association are: Winona and Dakota Counties, Northern States Power Company, United Power Association, Quadrant Company and Richards Asphalt.

<sup>4</sup> The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (non-hazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k).



now operating in the United States produce approximately 8.5 million tons of ash annually. See Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age 30, Figure 2 (November 1992) (ash tonnage calculated based on data presented). The decision below raises serious financial implications for managing this ash as hazardous waste and undermines the solid waste management plans of *amici* and many other communities throughout the United States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

#### SUMMARY OF ARGUMENT

The Resource Conservation and Recovery Act explicitly encourages the development of resource recovery facilities as an important means for reducing both our Nation's reliance on diminishing fossil fuel resources and the burden of disposing ever-increasing volumes of municipal solid waste. Consistent with those statutory objectives, RCRA section 3001(i) further encourages the development of resource recovery facilities by exempting from hazardous waste regulation the ash produced by such facilities. Specifically, RCRA section 3001(i) provides, in pertinent part, that a resource recovery facility burning municipal solid waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." This statutory provision originated from EPA's explanation of the "household waste exclusion" which provides that household waste is exempt from regulation as a hazardous waste under RCRA "in all phases of its *management*", including the ash resulting from the combustion of municipal solid waste (emphasis added). Repeating the terminology used by EPA to define the scope of the "household waste exclusion", RCRA section 3001(i) codified the "household waste exclusion" as applied to resource recovery facility ash by the section's express use of the term "otherwise managing". That

result is confirmed by the legislative history of section 3001(i).

The contrary decision of the court of appeals—based solely on the absence of the word "generation" from the list of resource recovery facility activities exempt from hazardous waste regulation—ignores the plain language and legislative intent of section 3001(i) and contravenes the explicit objectives of RCRA to promote the development of environmentally beneficial resource recovery facilities. Moreover, the court of appeals improperly declined to defer to the EPA Administrator's reasonable interpretation of RCRA section 3001(i), which concludes that ash from resource recovery facilities is exempt from RCRA's hazardous waste regulations. The court of appeals' decision poses severe consequences for local government. The decision undermines local solid waste management plans that are carefully designed to balance public health, environmental, and economic concerns, threatens the financial viability of most, if not all, resource recovery facilities due to the high cost of managing ash as a hazardous waste, and encourages environmentally inferior methods of solid waste disposal.

## ARGUMENT

### I. CONSISTENT WITH THE OBJECTIVES AND POLICIES OF RCRA, SECTION 3001(i) EXEMPTS RESOURCE RECOVERY FACILITY ASH RESIDUE FROM HAZARDOUS WASTE REGULATION

As often recognized by this Court, the meaning of a statute is determined by the particular language at issue within the context of the statute as a whole, including its object and policy. *E.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Section 3001(i) of RCRA, the statutory provision at issue here, states in relevant part that a “resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter” (section 3001(i) is reproduced in the Appendix to this brief). Because the word “generation” is not included in the phrase “treating, storing, disposing of, or otherwise managing”, the Seventh Circuit concluded that the ash residue of a resource recovery facility is subject to regulation as hazardous waste under RCRA. That narrow reading of section 3001(i) ignores the fundamental tenet of statutory construction that words have meaning only in context and is incompatible with the solid waste management policies and objectives of RCRA.<sup>5</sup>

#### A. The Plain Language And Legislative Intent Of RCRA Section 3001(i) Exempt Resource Recovery Facility Ash Residue From Regulation As A Hazardous Waste

The genesis of RCRA section 3001(i), as well as the context for interpreting its meaning, lies in EPA’s “house-

<sup>5</sup> The only other circuit to interpret RCRA section 3001(i) concluded that the statute exempts ash residue from regulation as a hazardous waste. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff’d* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991).

hold waste exclusion”.<sup>6</sup> Adopted in 1980 as part of EPA’s regulations governing RCRA’s hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976)) (RCRA’s hazardous waste management program “is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances”). In the preamble accompanying promulgation of the household waste exclusion, EPA explained that “[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste.” 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to “all phases of [the] management” of household waste, including ash residue after treatment, such as incineration.

Congress is presumed to know an agency’s interpretation of a law pertinent to legislation Congress is enacting, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and in 1984 when Congress enacted section 3001(i)—the “Clarification of the household waste exclusion”, the

<sup>6</sup> The “household waste exclusion” provides as follows:

The following solid wastes are not hazardous wastes:

- (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused. “Household waste” means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

40 C.F.R. § 261.4(b) (codified as amended).



regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation because the household waste exclusion already encompassed "all phases of [the] management" of household waste. See *City of Chicago*, 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). The focus of Congress' "clarification" in 1984 was whether EPA's 1980 regulation limiting the exclusion only to household waste—as opposed to including waste from non-household sources that contribute to the municipal waste stream (e.g., small commercial and industrial establishments, schools, etc.)—was consistent with Congress' intent. As explained in the Senate Report that accompanied the 1984 legislation:

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. \* \* \* *New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.*

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis added). Directly reflecting that intent, the statute provides that a resource recovery facility burning municipal solid waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are neither received nor incinerated at the facility. 42 U.S.C. § 6921(i). In short, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns

household waste *and* nonhazardous waste from sources other than households (e.g., commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or incinerate hazardous waste.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). The absence of the word "generation" to identify activities of resource recovery facilities that are exempt from hazardous waste regulation is, however, entirely consistent with the language used by EPA to explain the household waste exclusion—"[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes ash residue remaining after waste-to-energy combustion, are excluded from regulation as a hazardous waste.

Key legislative history, moreover, confirms that section 3001(i)'s use of the phrase "otherwise managing" was intended to exclude resource recovery facility ash from hazardous waste regulation. Specifically, the Senate Report, *supra*, accompanying the legislation describes the section 3001(i) exclusion as follows: "All waste *management* activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion. . . ." S. Rep. No. 284 at 61 (emphasis added).<sup>7</sup> When examined in this overall

<sup>7</sup> Importantly, the Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change. H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984).



context, the court of appeals' myopic reliance on the absence of the word "generation" in section 3001(i) is plainly misplaced.

The decision below also renders section 3001(i) essentially meaningless. Simply put, a resource recovery facility that accepts only household waste (deemed non-hazardous by EPA's household waste exclusion, *supra*, 40 C.F.R. § 261.4(b)(1)) and nonhazardous commercial or industrial waste would never be "treating, storing, disposing of, or otherwise managing hazardous wastes" and, thus a separate statutory exemption for such activities—section 3001(i)—would not be needed. As explained by the district court in *Wheelabrator*, *supra* note 5, if resource recovery facility ash is not excluded from hazardous waste regulation, "it is difficult to understand what, if any benefit resource recovery facilities derive from the exemption." 725 F. Supp. at 763 n.12. In short, the only meaningful interpretation of RCRA section 3001(i) is that it exempts resource recovery facility ash from regulation as a hazardous waste.

**B. The Only Interpretation Of RCRA Section 3001(i) That Serves RCRA's Objectives And Policies Is That Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulation**

The court of appeals' interpretation of RCRA section 3001(i) is also incompatible with the objectives and policies of RCRA as a whole. Since enactment of the Solid Waste Disposal Act in 1976, Congress has on numerous occasions expressed its intent to promote resource recovery facilities in order to achieve RCRA's goals of protecting health and environment and conservation of material and energy resources. See 42 U.S.C. § 6902 (a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). More specifically, in adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized

that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste." 42 U.S.C. § 6941a. See also S. Rep. No. 284 at 61 ("[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation").<sup>8</sup>

Congress' intent to encourage resource recovery facilities as environmentally beneficial solid waste management tools is also evident in RCRA's warnings that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. §§ 6901(b)(1) and (8). Consistent with those statutory objectives, waste combustion with energy recovery is favored over landfilling, the principal alternative. See *1990 Update* at 4; *1992 Update* at 1-4; see also 54 Fed. Reg. 52209, 52245 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in [a municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste management option (see RCRA section 1002(b)(8)), but it is

<sup>8</sup> The volume of municipal solid waste in the United States, as well as the burden of disposing that waste, continues to increase steadily. For the most recent three-year period for which EPA survey data are available (1988-90), MSW increased by 9 percent—180 million tons to 195.7 million tons. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019, ES-3 (July 1992) (cited below as "*1992 Update*"); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/530-SW-90-042, ES-3 (June 1990) (cited below as "*1990 Update*"). Moreover, EPA projects an increase to 222 million tons by the year 2000. *1992 Update* at ES-3.

sound policy to recover the energy value of the combustibles rather than burying them") (citations omitted).<sup>9</sup>

The objectives and policies of RCRA encouraging the production of usable energy from waste to reduce both our reliance on diminishing fossil fuel resources and the burden of disposing of increasing volumes of MSW directly parallel numerous state laws that vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. For example, section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ." Likewise, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage resource recovery and establishment of waste-to-energy facilities" with the "goal of reducing land disposal to unusable residuals by the year 2005".<sup>10</sup> The

<sup>9</sup> Combustion reduces waste volume or mass by approximately 90 percent. See Jonathan V.L. Kiser, *A Comprehensive Report on the Status of Municipal Waste Combustion*, Waste Age 109, 156 (November 1990). See also Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment"); N.H. Code Admin. R. 149-M:1-a (waste-to-energy technologies are preferred over landfilling).

<sup>10</sup> See also Fla. Stat. Ann. § 377.709 (MSW combustion "to supplement the electricity supply not only represents an effective con-

result of these laws and policies has been a significant increase in the development of waste-to-energy, resource recovery facilities (employing state-of-the-art air pollution control systems) by local government as part of integrated solid waste management plans (which also include source reduction, recycling, etc.). Between 1985 and 1990 annual combustion of MSW with energy recovery increased from 7.6 to 29.7 million tons. *1992 Update* at 3-2, Table 24; see also *id.* at 3-3. The 1990 level is projected to increase more than 50 percent by the year 2000 and reach 46.2 million tons. *Id.* at 4-16 and 4-18, Table 34. An important source of electric energy, the federal government has projected a seven-fold increase between 1991 and 2010 in the amount of electricity generated in the United States from MSW combustion. See U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' decision contravenes the policies and objectives of RCRA (and the state statutes and policies which it spawned) and imposes a classic "Catch-22" on *amici* and many other communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facilities were not only environmentally superior, but also generally more costly in the short run than landfilling MSW.<sup>11</sup> If the ash residue from a resource recovery

servation effort but also represents an environmentally preferred alternative to conventional solid waste disposal"); Pa. Stat. Ann. title 35, § 6018.102(2) (encouraging the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy"); Va. Code Ann. § 10.1-1402 (Virginia Waste Management Board directed to promote the development of resource recovery systems); *Michigan Solid Waste Policy*, *supra* note 9 (establishes goal of managing 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reducing the amount of MSW going to landfills to 10 percent by the year 2005).

<sup>11</sup> The processing or "tipping" fees charged by modern resource recovery facilities are generally \$40 to \$100 per ton of municipal



facility must now be managed subject to hazardous waste standards, operating costs will increase dramatically. For example, recent EPA data show that the cost of disposal in a hazardous waste landfill is ten times the cost of disposal at a nonhazardous waste (Subtitle D) landfill:

Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately \$453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately \$42.00 per ton.

Memorandum from William K. Reilly, Administrator, U.S. EPA, to all Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 7 (September 18, 1992) (cited below as "EPA Administrator's Memorandum"), *reprinted in* the appendix to Petition for a Writ of Certiorari ("Pet. App."), S. Ct. Case No. 92-1639, 41a, 48a-49a. As a consequence of that more than ten-fold increase in ash disposal costs as well as other costs associated with managing ash as a hazardous waste (e.g., ash testing, employee training, etc.), the tipping fees charged by individual resource recovery facilities could easily double or triple.<sup>12</sup> The economic burden

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solid waste processed. Kiser, *supra* note 9, at 156. In contrast, the 1990 average landfill tipping fee in the United States was \$26.56 per ton. National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991). Resource recovery facilities are generally more costly than landfilling because of the very substantial investment in plant and equipment.

<sup>12</sup> MSW combustion ash amounts to approximately 25 percent (dry weight) of unprocessed MSW input. *1992 Update* at 3-3. Accordingly, the tipping fee for each ton of MSW processed would generally include the cost to dispose of 0.25 tons of ash (i.e., 25 percent of \$453 or approximately \$113). With the increases in ash disposal cost noted above, a tipping fee currently in the range of \$50 per ton of MSW processed (*see supra* note 11) would triple.

that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities.

The additional cost burden is, moreover, a very troubling prospect for communities across the United States who already face fiscal problems. Protection of public health and the environment is a primary concern of *amici* and a principal factor underlying development of resource recovery facilities by the communities *amici* represent. Nevertheless, the cost of complying with federal environmental mandates has become a serious concern for local government. *See* Ohio Municipal League, *Ohio Metropolitan Area Cost Report for Environmental Compliance* (September 15, 1992); Municipality of Anchorage, Alaska, *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (January 1993). As a result of the court of appeals' decision, *amici* and many communities across the United States that are already grappling with serious fiscal problems now face an additional burden—a dramatic increase in waste management costs far beyond the level of cost anticipated when those communities chose resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing resource recovery facilities to shut down, and future development of new facilities would essentially be eliminated, all of which is contrary to RCRA's policy of encouraging resource recovery and alternatives to land disposal of solid wastes.<sup>13</sup>

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<sup>13</sup> It is likely to be more economic for many communities to shut down their resource recovery facilities, landfill the communities' MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facilities rather than operate the facilities and have to absorb the cost to manage ash residue as hazardous waste. *See supra* notes 11 and 12. Moreover, the potential liability associated with navigating the complex scheme



The decision below also is incompatible with RCRA's goals of protecting public health and the environment. In support of its decision that MSW ash must be treated as hazardous waste, the court of appeals stated that "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, MSW combustion ash poses less environmental concern than the alternative that the court's decision necessarily encourages, landfilling of MSW. *See supra* note 9. *See also* State of Florida, Division of Administrative Hearings, *Final Order Approving Certification*, Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility (No. 90-3942EPP), at 3-4 (June 19, 1992) (adopting Recommended Order's finding of fact ¶ 7 (December 9, 1991) that leachate from MSW combustion ash is far less of an environmental concern than the leachate from MSW); U.S. Environmental Protection Agency, *Characterization of Municipal Waste Combustion Ash, Ash Extracts and Leachates*, EPA/530-SW-90-29A (March 1990) (leachate from ash monofills generally meets EPA's drinking water standards). In fact, MSW combustion ash is now being beneficially reused in a variety of applications, including road construction and as a raw material in cement manufacturing. *See* Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power 18, 19-20 (September/October 1992) (as a result of the lime used by the pollution control systems of many resource recovery facilities, the ash residue contains concrete-like mineral end products that prevent heavy metals from being released into the leachate); *see also* N.Y. Comp. Codes R. & Regs. title 6, § 360-3.5(h)

of federal hazardous waste regulations would further discourage the use of resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

(requirements for approval of beneficial use of MSW ash residues); Fla. Admin. Code Ann. r. 17-702.600 (requirements for recycling MSW ash residue).<sup>14</sup>

Finally, the court of appeals' decision raises potentially serious implications for our Nation's limited hazardous waste landfill capacity. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.<sup>15</sup> Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon.<sup>16</sup> On the other hand, resource recovery facilities currently in operation produce approximately 8.5 million tons of ash each year. *See supra* p. 6. If ash must now be disposed in hazardous waste landfills, it can readily be seen that all

<sup>14</sup> The Seventh Circuit's above-quoted statement also appears to have been made without considering the record in this case. The waste combustion ash directly at issue here (from Chicago's Northwest Waste-to-Energy Plant) is disposed in Michigan at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. *Petition for a Writ of Certiorari*, S. Ct. Case No. 92-1639, at 7. Those disposal standards are required by Michigan law, Mich. Comp. Laws § 299.432a, and are typical of the laws of a number of other states. *See, e.g.*, Mass. Regs. Code title 310, § 19.119; Fla. Admin. Code Ann. r. 17-702.570. *See also* 40 C.F.R. part 258 (adopting stringent federal criteria for municipal landfills and monofills receiving MSW combustion ash).

<sup>15</sup> *Regulation of Municipal Solid Waste Incinerators: Hearing on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

<sup>16</sup> Of the 20 hazardous waste landfills in the United States, only one (Last Chance, Colorado hazardous waste landfill) has been permitted during the past twelve years. *See* William Gruber, *TSD Summary 1993*, EI Digest 14, 17 (January 1993); Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest 24 (March 1992).

of the United States' current hazardous waste landfill capacity could be consumed within a very short period, thereby creating a hazardous waste management crisis.

In sum, the court of appeals' decision ignores the plain meaning and legislative intent of section 3001(i). As a result, the decision jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to RCRA's policy and objectives.

## II. THE EPA ADMINISTRATOR'S INTERPRETATION OF RCRA SECTION 3001(i) THAT RESOURCE RECOVERY FACILITY ASH IS EXEMPT FROM HAZARDOUS WASTE REGULATION IS ENTITLED TO DEFERENCE

*Amici* submit that RCRA section 3001(i), based on its plain meaning as well as the overall legislative context of RCRA's policies and objectives, exempts resource recovery facility ash from hazardous waste regulation. Nevertheless, should this Court conclude that section 3001(i) is ambiguous with regard to the regulatory treatment of resource recovery facility ash residue, deference to the EPA Administrator's reasonable interpretation of section 3001(i) is warranted. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

When certiorari was initially granted in this matter, the decision below was remanded to the court of appeals for further consideration in light of the EPA Administrator's September 18, 1992 memorandum, *supra* p. 16. *See* 113 S. Ct. at 486. That memorandum concluded that the exemption of resource recovery facility ash from hazardous waste regulation is consistent with the language of section 3001(i) and its legislative history, and best serves RCRA's goals of protecting the environment and promoting resource recovery. EPA Administrator's Memorandum, Pet. App. at 49a. On remand, the Seventh Circuit

summarily declined to defer to the EPA Administrator's interpretation reasoning that it was yet another change in EPA's interpretation of section 3001(i). 985 F.2d at 304.

The EPA provided its initial interpretation of section 3001(i) in the regulatory preamble that accompanied codification of section 3001(i) in EPA's hazardous waste management regulations. 50 Fed. Reg. 28702, 28725 (July 15, 1985). While noting that it did not interpret section 3001(i) as exempting MSW ash from hazardous waste regulation if that ash "routinely exhibits" a hazardous waste characteristic, EPA concluded its discussion of section 3001(i) by stating that the Agency:

does not believe the [1984 RCRA amendments—including section 3001(i)] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

*Id.* at 28726. The concluding statement strongly suggests that MSW ash is exempt from hazardous waste regulation as it had been under the household waste exclusion.<sup>17</sup>

<sup>17</sup> Subsequent congressional testimony demonstrates EPA's ongoing analysis of the issue. *See Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987) (statement of J. Winston Porter, EPA Asst. Administrator, Office of Solid Waste and Emergency Response) (after reconsidering its 1985 statement that ash could be hazardous, the Agency believes it may have been in error); *Regulation of Municipal Solid Waste Incinerators*, *supra* note 15, at 33 (statement of Sylvia Lowrance, EPA Director, Office of Solid Waste) (EPA continues to follow its 1985 interpretation, but believes the statute needs to be clarified).



The EPA Administrator's September 1992 memorandum conclusively and authoritatively reaches that same conclusion: resource recovery facility ash is not subject to regulation as a hazardous waste. As explained in that memorandum, EPA believes that its interpretation is consistent with the text and legislative history of section 3001(i) and best serves that statute's goals of protecting the environment and promoting resource recovery. EPA Administrator's Memorandum, Pet. App. at 49a. The Administrator's interpretation is also supported by EPA's recent adoption of stringent criteria for municipal landfills and monofills that receive MSW ash, including siting restrictions, facility design and operating criteria, and ground water monitoring requirements. *Id.* at 46a-47a. *See supra* note 14.

Contrary to the court of appeals' conclusion, the evolution of EPA's analysis on this important issue does not summarily negate the deference due to the final decision expressed in the EPA Administrator's memorandum. *See Chevron*, 467 U.S. at 863-64 (revised agency interpretations deserve deference, as administrative agencies must consider the wisdom of their policies on a continuing basis). Moreover, even "sharp breaks" with prior agency interpretations are entitled to deference, *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991) (quoting *Chevron*, 467 U.S. at 862), where the revised interpretation is supported by a reasoned analysis. *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

In this case, even if the EPA Administrator's memorandum can be considered a "sharp break" from a well-settled interpretation, deference is required because the "changed" interpretation is supported by a reasoned analysis. Specifically, as explained in the EPA Administrator's memorandum, the conclusion that MSW ash is exempt from hazardous waste regulation is based on the Agency's analysis of the plain language and legislative intent of section

3001(i), the statutory policies encouraging resource recovery facilities, and environmental and solid waste management policy considerations. *Cf. Rust*, 111 S. Ct. at 1769 (agency's change in interpretation justified where prior policy failed to implement the statute properly and the new regulations are more consistent with the original intent of the statute). The conclusion reached by the Administrator's memorandum is the only permissible interpretation of RCRA section 3001(i). To deny deference to an agency interpretation which revises a prior internally inconsistent interpretation of the statutory language is irrational.

Thus, to the extent this Court finds the language of section 3001(i) to be ambiguous, deference should be granted to the EPA Administrator's reasonable interpretation of the statute, namely, that resource recovery facility ash is not subject to hazardous waste regulation under RCRA.

### CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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**APPENDIX**

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

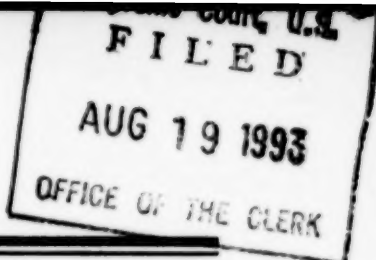
(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

No. 92-1639



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OCTOBER TERM, 1993

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v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit

BRIEF OF WHEELABRATOR TECHNOLOGIES INC.  
AND INTEGRATED WASTE SERVICES ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**BRIEF OF WHEELABRATOR TECHNOLOGIES INC.  
AND INTEGRATED WASTE SERVICES ASSOCIATION  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

---

Wheelabrator Technologies Inc. and the Integrated Waste Services Association respectfully file this brief as *amici curiae* in support of the petitioners. Written consent has been obtained from counsel for petitioners and respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

**INTEREST OF AMICI CURIAE**

Wheelabrator Technologies Inc. ("Wheelabrator") is the defendant in the Second Circuit case addressing the



legal status of ash at the Westchester County Resource Recovery Facility ("Facility"). The opinion in that case is in direct conflict with the Seventh Circuit opinion under review here. Wheelabrator is a founding member of the Integrated Waste Services Association.

As the prevailing party in the Second Circuit case, Wheelabrator brings a unique perspective to this proceeding. Wheelabrator has been in the business of designing, constructing, owning and operating resource recovery facilities ("RRFs") for over 15 years. Currently, Wheelabrator operates 14 RRF plants and five small power facilities which each day generate 13 million kilowatt hours of electricity, equivalent to the electricity generated by over 35,000 barrels of oil. Wheelabrator's RRFs eliminate eighty percent of the weight and ninety percent of the volume of municipal solid waste while recovering over 600 kilowatt hours per ton. Wheelabrator is one of the nation's ten largest independent power producers.

The Integrated Waste Services Association ("IWSA") is a national trade association comprised of firms that design, construct, operate and own municipal solid waste management facilities, including composting, recycling and resource recovery facilities for cities and counties. IWSA is committed to integrated solid waste management policies that enable communities across the nation to utilize the best combination of environmentally safe and cost effective solid waste options to meet local needs—including waste reduction, recycling, RRFs and landfilling. This integrated approach is accepted by the Environmental Protection Agency ("EPA"), state and local governments and major public policy organizations such as the U.S. Conference of Mayors and others.

Resource recovery facilities are an important component of integrated waste management. The 142 RRFs currently operating in the United States manage about 17% of our nation's trash. These plants also produce the equivalent amount of energy to power approximately 1.3 million homes, saving 31 million barrels of oil that would

otherwise cost three-quarters of a billion dollars each year. Ash from RRFs is currently managed in landfills (with other municipal wastes) or in monofills (a landfill containing only ash). EPA has stated on numerous occasions that management of ash in these ways is fully protective of human health and the environment. IWSA is vitally interested in the statutory and regulatory status of ash from RRFs because it is IWSA members who bear the responsibility, along with local government entities, for compliance with Resource Conservation and Recovery Act ("RCRA") regulations for ash.

The City of Chicago's brief will demonstrate that the plain language of Section 3001(i) of RCRA excludes the entire waste stream processed at an RRF, including ash residues, from regulation as hazardous waste under the RCRA program. *Amici* agree with Chicago on this point as set forth below. In addition, *Amici* emphasize in this brief that any possible statutory ambiguity regarding the regulatory status of ash is resolved by the clear and incontrovertible administrative and legislative history of Section 3001(i) of RCRA—the "clarification of household waste exclusion." See 42 U.S.C. § 6921(i).

## STATEMENT OF THE CASE

### A. Introduction

Six of the eight judges who have addressed the issue have properly held that Section 3001(i) of RCRA excludes the ash from resource recovery facilities from regulation as a hazardous waste. The Seventh Circuit majority holding to the contrary fundamentally misreads the language, purpose and context of the statute, leading to a bizarre result—a statute that was clearly intended to clarify and broaden the applicability of EPA's household waste exclusion is instead held to narrow it.

**B. The United States District Court for the Southern District of New York Held That Section 3001(i) Excludes Ash From Regulation as a Hazardous Waste and the Second Circuit Affirmed.**

The Environmental Defense Fund ("EDF") filed complaints against Wheelabrator in the United States District Court for the Southern District of New York ("Southern District") and against the City of Chicago in the United States District Court for the Northern District of Illinois on January 27, 1988, alleging in both cases that the ash from the RRFs should be regulated as a hazardous waste under Subtitle C of RCRA, 42 U.S.C. §§ 6921-39e, rather than as a nonhazardous waste under Subtitle D, 42 U.S.C. §§ 6941-49a. Chicago will chronicle the history of the Seventh Circuit proceedings in its brief. Wheelabrator and IWSA describe below the background of the Southern District and Second Circuit proceedings.

Wheelabrator moved for dismissal or summary judgment on the ground that Section 3001(i) of RCRA excludes ash from hazardous waste regulations if the RRF complies with the requirements of that statutory provision. EDF cross-moved for summary judgment.

In an exhaustive opinion rendered on November 21, 1989, Judge Haight agreed with Wheelabrator that ash managed at a facility meeting the requirements of 3001(i) is excluded from regulation as a hazardous waste under RCRA. *Environmental Defense Fund v. Wheelabrator Technologies Inc.*, 725 F. Supp. 758, 764-70 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, — U.S. —, 112 S. Ct. 453 (1991). The Court directly addressed and rejected EDF's central thesis that Section 3001(i) was enacted merely to exempt the Facility from being regulated as a hazardous waste treatment, storage and disposal ("TSD") facility. Such as interpretation would, the court held, render the statute superfluous:

EDF contends that Section 3001(i) merely exempts the Facility from regulation as a treatment, storage and disposal ("TSD") facility (facilities that

manage, rather than produce hazardous waste). However, by its own terms Section 3001(i) does not apply to resource recovery facilities that accept hazardous waste for incineration, and plaintiff argues that if a resource recovery facility should ever accept hazardous waste, even accidentally, it would not be eligible for exemption even from regulation as a TSD facility. Under plaintiff's construction of Section 3001(i) it is difficult to understand what, if any, benefit the Facility derives from the exemption. Plainly, if the Facility never accepts hazardous waste for processing, it would not be subject to regulation as a TSD facility even absent the exclusion.

*Id.* at 763, n.12.

The Court also found that the Facility satisfied the Section 3001(i) requirement that it have adequate contractual safeguards to prevent the acceptance of hazardous waste and adequate notification and inspection procedures. *Id.* at 773, 772. The Court denied Wheelabrator's motion for summary judgment, however, to give EDF an opportunity to explore through expedited discovery "whether and with what frequency the Facility accepts hazardous waste for processing." *Id.* at 775.

EDF engaged in discovery and ultimately conceded by stipulation that it was aware of no evidence that the Facility accepted hazardous waste from commercial or industrial sources. Wheelabrator filed a second motion for summary judgment, EDF stipulated that it would not oppose entry of judgment in Wheelabrator's favor, and the Court entered summary judgment for Wheelabrator on April 4, 1990.

The Second Circuit affirmed in a unanimous opinion, adopting Judge Haight's "thorough and well reasoned opinion," and this Court denied *certiorari*. *EDF v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir.), *cert. denied*, — U.S. —, 112 S. Ct. 453 (1991).

The district court in Chicago subsequently issued a decision in complete accord with the Southern District.



*Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated and remanded*, — U.S. —, 113 S. Ct. 486 (1992), *adhered to on remand*, 985 F.2d 303 (7th Cir.), *cert. granted*, — U.S. —, 61 U.S.L.W. 3851 (1993).

**C. Regulation of Ash Under Subtitle D Is Safe, Environmentally Sound, and Promotes Resource Recovery.**

**1. Ash Is Safely Managed Under Subtitle D.**

Two judges in the Seventh Circuit raise the specter of environmental catastrophe if ash is not regulated as a hazardous waste. These judges assert that "massive amounts of hazardous waste" may "seep into the ground and water table." *EDF v. City of Chicago*, 948 F.2d 345, 352 (7th Cir. 1991). This is unsubstantiated hyperbole. There is absolutely no evidence in either the Seventh or Second Circuit cases of any ground or surface water contamination or any other health, safety or environmental problem resulting from management of ash.

In fact, several recent studies confirm that ash does not pose a health threat when disposed in Subtitle D landfills or monofills.<sup>1</sup> Moreover, recent studies conclude that "leachate" (the liquid mixture created when rain or snow filters through a landfill) from Subtitle D landfills con-

<sup>1</sup> Although ash may fail EPA's laboratory test for toxicity, which is intended to duplicate leaching conditions in landfills over time, actual studies reveal that hazardous constituents, including lead and cadmium, do not leach from ash at any rate remotely approaching that predicted by the laboratory method. NUS Corporation on behalf of U.S. Environmental Protection Agency, Document No. EPA/530-SW-87-028A, "Final Characterization of Municipal Waste Combustion Ashes and Leachates From Municipal Solid Waste Landfills, Monofills and Codisposal Sites," Vol. 1 at 7-7 (Oct. 1987) ("The EP toxic procedure extracted significantly higher levels of metals than were found in the actual leachate.") See also Richard W. Goodwin, *Defending the Character of Ash*, VI Solid Waste & Power (Sept.-Oct. 1992) at 18, 20.

taining ash routinely meets or approaches federal drinking water standards.<sup>2</sup> Indeed, EPA has consistently taken the position that ash "can be regulated in a manner that will be protective of human health and the environment under RCRA Subtitle D."<sup>3</sup> In addition, stringent new Subtitle D landfill regulations will provide additional assurance that ash is safely disposed.<sup>4</sup>

<sup>2</sup> Coalition on Resource Recovery and the Environment and NUS Corporation on behalf of U.S. Environmental Protection Agency, Document No. EPA/530-SW-90-029A, "Characterization of Municipal Waste Combustion Ash, Ash Extracts, and Leachates" 7-4 (Mar. 1990) (majority of leachate samples from five different Subtitle D landfills containing ash met federal drinking water standards for metals). See also Solid Waste Association of North America and Center for Resource Recovery, Technology and Science, "Municipal Waste Combustion Ash and Leachate Characterization—Monofill Fourth Year Study" 22 (Mar. 1992) (fourth yearly study of an ash monofill indicates that, except for manganese, leachate samples met federal drinking water standards for all analyzed metals).

<sup>3</sup> William K. Reilly, Administrator, U.S. Environmental Protection Agency, "Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)" (Sept. 18, 1992) at 1. ("Reilly Memorandum").

<sup>4</sup> 56 Fed. Reg. 50,978 (1991). These regulations require that landfills comply with specific "location criteria" to ensure that landfills will not be located in certain areas where they could pose a threat. 40 C.F.R. §§ 258.10-258.16. In addition, the regulations impose stringent operating restrictions, such as drainage requirements, to eliminate discharges of pollutants to surface water. See, e.g., 40 C.F.R. §§ 258.25, 258.27. New landfills must include liners and leachate collection systems to prevent releases of pollutants to ground water. 40 C.F.R. § 258.40. Finally, municipal landfill operators must monitor groundwater to detect any releases from a landfill, and if any releases are detected, must clean them up. 40 C.F.R. §§ 258.50-58. The regulations are due to become effective for all facilities on October 9, 1993. 56 Fed. Reg. 51,040 (1991). That deadline remains in place for new landfills and existing landfills that accept 100 tons or more per day. EPA has proposed to extend the deadline to April 9, 1994 for existing small landfills accepting less than 100 tons per day and meeting certain other requirements. 58 Fed. Reg. 40,568 (1993).



**2. *The Section 3001(i) Exclusion is One of Several Exclusions of Waste Streams from RCRA Hazardous Waste Regulation.***

Section 3001(i) is not the only statutory or regulatory provision excluding waste from Subtitle C regulation for policy reasons. Other exclusions exist for coal and other fossil fuel combustion wastes; drilling fluids and other oil, natural gas and geothermal energy exploration, development or production wastes; ore and mineral extraction, beneficiation and processing wastes; and cement kiln dust wastes. 42 U.S.C. §§ 6921(b)(2) and (3). Congress directed EPA to prepare a Report to Congress on each of these wastes, to hold hearings, and then to determine whether regulation under Subtitle C is warranted. 42 U.S.C. §§ 6921(b)(2), (3)(A), and (3)(C) and 6982(f), (m), (n), (o), and (p). These exclusions have continued for many years, some pending the outcome of the studies, and others because EPA has determined that regulation under Subtitle C is not appropriate.<sup>5</sup> In addition, EPA has excluded from hazardous waste regulation agricultural wastes returned to the soil as fertilizers; mining overburden returned to the mine site; certain trivalent chromium wastes; and certain arsenical-treated wood and wood products. 40 C.F.R.

<sup>5</sup> Cement kiln dust wastes remain excluded from Subtitle C regulation pending completion of the study and a regulatory determination by EPA. For the remaining categories, EPA has determined that Subtitle C regulation is not appropriate for any of the wastes considered to date. See 58 Fed. Reg. 42,466 (1993) (determination that certain coal combustion wastes are not appropriate for Subtitle C regulation); 53 Fed. Reg. 25,446 (1988) (regulation of certain oil, gas, and geothermal exploration, development, and production wastes under Subtitle C is unwarranted); 58 Fed. Reg. 15,284 (1993) (clarification of the scope of exploration, development and production wastes excluded from Subtitle C regulation); 51 Fed. Reg. 24,496 (1986) (regulation of wastes from the extraction and beneficiation of ores and minerals under Subtitle C is not warranted); 56 Fed. Reg. 27,300 (1991) (determination that certain mineral processing wastes are not appropriately regulated under Subtitle C).

§§ 261.4(b)(2), (3), (6) and (9) as amended at 57 Fed. Reg. 30,657-58 (1992).

All of these provisions demonstrate that exclusions from Subtitle C are not unusual; rather, the exclusions reflect determinations by Congress and EPA that certain waste streams should not be subject to hazardous waste regulation for important policy reasons. Indeed, in a regulatory determination issued two weeks ago, EPA decided not to impose Subtitle C regulation on ash from coal fired electric utilities, notwithstanding that the ash at times exhibits levels of lead, cadmium, chromium, mercury and arsenic that exceed the toxicity characteristic.<sup>6</sup>

**3. *Management of Ash Under Subtitle D Promotes the Policy Objectives of RCRA.***

In enacting RCRA in 1976, Congress expressed its desire to promote resource recovery as well as the safe management of hazardous wastes. Congress specifically recognized that resource recovery facilities could contribute to a solution to solid waste disposal problems in this country. Two of the stated objectives of RCRA were to assist states in developing solid waste management plans "(including resource recovery and resource conservation systems)," 42 U.S.C. § 6902(1), and to promote "solid waste management, resource recovery and resource conservation systems which preserve and enhance the quality of air, water, and land resources." 42 U.S.C. § 6902(7).

In 1980, Congress passed further amendments to RCRA in legislation known as the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-463, 46 Stat. 2055 (1980) (the "SWDA"), reaffirming Congress's strong support for the development of resource recovery facili-

<sup>6</sup> 58 Fed. Reg. 42,466, 42,476 (1993). EPA noted that regulation of ash from coal combustion under Subtitle C would impose unnecessary burdens in excess of what is required to protect human health and the environment. *Id.* at 42,477.

ties within Subtitle D's solid waste management framework. For example, the SWDA provided that EPA was authorized to assist the states in removing or modifying "legal, institutional, and economic impediments which have the effect of impeding the development of systems and facilities to recover energy and materials from municipal waste . . . ." 42 U.S.C. § 6948(d)(3).<sup>7</sup>

These congressional actions prior to the enactment of Section 3001(i), along with the clear congressional intent to clarify the scope of the household waste exclusion in 1984 as it applied to resource recovery facilities, demonstrate that Congress intended to promote resource recovery facilities within the framework of Subtitle D. It would make little sense for Congress to have so carefully crafted a system to encourage the development of resource recovery within the framework of Subtitle D only to have failed to include the management of ash from those facilities within that same system.

### SUMMARY OF ARGUMENT

Congress enacted—and specifically denominated—Section 3001(i) as a clarification of EPA's regulatory household waste exclusion. All parties agree that the regulatory exclusion excludes the household waste stream, in all phases of its management, from hazardous waste regulation, including ash remaining after incineration by a resource recovery facility.

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<sup>7</sup> See also 42 U.S.C. § 6911(b) (creating interagency coordinating committee to coordinate all federal agency activities dealing with resource conservation and recovery from solid waste); *id.* § 6941 (one of the objectives of Subtitle D program is to assist in development of methods of waste disposal which maximize the utilization of energy and materials recoverable from solid waste); *id.* § 6943(c)(1)(B) (states may receive financial assistance under Subtitle D from EPA only if the State program analyzes and offers recommendations to overcome the impediments to resource recovery systems and facilities).

There was, however, in 1984, some question as to whether the typical resource recovery facility that accepted nonhazardous solid wastes from schools, churches, municipal buildings and the like together with household waste was covered by the household waste exclusion. It is this issue to which Congress responded in enacting Section 3001(i). Congress clarified its original intent to include such resource recovery facilities within the scope of the exclusion as long as those facilities adopted new prophylactic measures to ensure against the receipt and burning of wastes regulated as hazardous.

Congress expressed its intent through statutory language providing that a resource recovery facility shall "not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if certain conditions are met. The management of ash from incineration of waste at a resource recovery facility fits squarely within this statutory language.

The complete and uncontroverted legislative history of Section 3001(i), together with the administrative history of the household waste exclusion, confirm that ash from a resource recovery facility meeting the requirements of Section 3001(i) is excluded from Subtitle C regulation. Any other reading would, as the Second Circuit unanimously affirmed, deprive the statute of any meaning.

EDF goes through tortured statutory construction and ignores clear legislative purpose to achieve the result that its policy predilections favor. EDF cannot, however, ultimately ignore that its argument turns on its head a statutory provision that was designed to encourage, with new environmental safeguards, resource recovery as an important solid waste disposal option.



## ARGUMENT

### I. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT SECTION 3001(i) OF RCRA DOES NOT EXCLUDE ASH FROM REGULATION AS A HAZARDOUS WASTE.

It is a cardinal rule of statutory construction that statutes are to be read "as a whole, since the meaning of statutory language, plain or not, depends on context." *Conroy v. Aniskoff*, — U.S. —, 113 S. Ct. 1562, 1565 (1993) (citations omitted). Statutory terms should be interpreted on the basis of the meaning that is "(1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . ." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (emphasis in original). In this case, Congress specifically enacted and designated Section 3001(i) as a "clarification" of EPA's pre-existing household waste exclusion. Upon examination of that exclusion, the plain language of Section 3001(i), and the issue that Congress enacted Section 3001(i) to "clarify," it is clear that Section 3001(i) excludes ash from regulation as a hazardous waste under RCRA.

#### A. The 1980 Household Waste Exclusion that was "Clarified" by Section 3001(i) Excludes from Regulation as Hazardous Waste Ash from RRFs that Burn Only Household Waste.

When Congress enacted RCRA in 1976, it delegated to EPA the task of defining by regulation those wastes that would be subject to the requirements of Subtitle C rather than the Subtitle D requirements applicable to nonhazardous solid wastes. 42 U.S.C. § 6921. Congress did not, however, leave EPA entirely without guidance; it expressed its intent that all household and general municipal

wastes should be excluded from hazardous waste regulations. The Report of the Senate Committee on Public Works accompanying the legislation that eventually became RCRA explicitly stated that the hazardous waste permit program "is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976).

In its first set of final regulations implementing RCRA, issued in May 1980, EPA responded to this expression of congressional intent by promulgating a provision known as the "household waste exclusion." 45 Fed. Reg. 33,120 (1980). That regulation provided in pertinent part as follows:

#### § 261.4 Exclusions

(b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

*Id.* (codified as amended at 40 C.F.R. § 261.4(b)(1)).

EPA stated unequivocally in the preamble to this regulation (the "1980 Preamble") that the entire household waste stream is excluded from hazardous waste regulation and that ash residue from the incineration of household waste is also excluded from hazardous waste regulation:

The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. *Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous*



waste. Such wastes, however, must be transported, stored, treated and disposed in accord with applicable State and federal requirements concerning management of solid waste . . . .

*Id.* at 33,099 (emphasis added). EPA further justified its determination that ash from the incineration of household waste is excluded from regulation on the ground that Congress intended to “exclude waste streams generated by consumers at the household level.” *Id.* at 33,099 (emphasis in original). Thus, EPA exempted household waste during all phases of its management, from origination in households, through treatment by RRFs, to ultimate disposal by landfilling the ash residue.

The 1980 Preamble language is critical because it clearly refutes EDF’s and the Seventh Circuit’s central contention that the statutory language of Section 3001(i)—“a resource recovery facility . . . shall not be deemed to be treating, storing, disposing of, or otherwise managing . . .”—does not encompass what EDF characterizes as the “generation” of ash by the RRF. Even EDF concedes that the original administrative exclusion would apply to ash from RRFs that accept and burn only household waste. Appellant’s Brief at 27, *EDF v. Wheelabrator*, 931 F.2d 211 (2d Cir. 1991) (No. 90-7437); Appellants’ Brief at 27, *EDF v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991) (No. 90-3060). Nevertheless, neither the regulatory text, nor the preamble to the very household waste exclusion that was clarified in Section 3001(i) contains the term “generation.” EDF does not and cannot explain why, under its theory, the absence of the term “generation” in the 1980 household waste exclusion is not important, yet the absence of that term in the language of 3001(i) is so critical.

Moreover, the 1980 Preamble demonstrates that the term “otherwise managing” in Section 3001(i) includes management of ash.<sup>8</sup> The Preamble provides that house-

<sup>8</sup> Section 3001(i) also contains the terms “storing” and “disposing,” which, as discussed in the next section, can easily be

hold waste is excluded in “all phases of its management,” with “residues remaining” after “incineration” specifically defined as a covered “phase.” Accordingly, ash is not subject to regulation as hazardous waste because it is part of the “management” of the household waste stream generated by consumers at the household level.

EPA thus established an exclusion applicable to the entire household waste stream—as even EDF concedes. Appellant’s Brief at 27, *Wheelabrator* (No. 90-7437); Appellants’ Brief at 27, *City of Chicago* (No. 90-3060). It is this exclusion that Congress addressed in 1984 by enacting Section 3001(i), clarifying that the exclusion applied not only to ash resulting from the incineration of household waste, but also to ash generated by RRFs from the incineration of household waste *and* nonhazardous commercial and industrial solid waste, which waste is similar in composition to wastes generated by households. See William K. Reilly, Administrator, U.S. Environmental Protection Agency, “Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)” (Sept. 18, 1992) at 2 (“Reilly Memorandum”).<sup>9</sup>

#### **B. The Plain Language of Section 3001(i) Excludes the Management of Ash from Hazardous Waste Regulation.**

Virtually all RRFs accept municipal solid waste composed of waste from households as well as nonhazardous

interpreted to include the storing of ash on-site at the RRF and disposal of ash in a landfill.

<sup>9</sup> The 1984 statutory clarification was not the first such clarification of the household waste exclusion. EPA amended this provision in 1984 to include several additional categories of wastes that were similar enough to be treated as “household waste,” including wastes from bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas. See 49 Fed. Reg. 44,978 (1984).

solid waste from sources such as schools, restaurants, municipal and private office buildings, small businesses and the like. While it was clear, as discussed above, that ash from an RRF that accepted only household waste was excluded from regulation under the household waste exclusion, there was some uncertainty in 1984 as to the status of the typical facility that accepted wastes similar to, but from sources other than, households. It is this uncertainty to which Congress responded when it enacted Section 3001(i) "clarifying" that the household waste exclusion applies to RRFs that accept such nonhazardous commercial and industrial waste as long as certain prophylactic procedures are in place. The statute provides:

*Clarification of Household Waste Exclusion.*

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

- (1) such facility—
  - (A) receives and burns only
    - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
    - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
  - (B) does not accept hazardous wastes identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).

The statute plainly excludes all waste management activities of an RRF, including the management of ash, from hazardous waste regulation under RCRA. By using the all-encompassing language "treating, storing, disposing of, or otherwise managing hazardous wastes," Congress expressed its intent that all activities of a qualifying RRF are excluded from hazardous waste regulation, and it did so by using essentially the same language found in EPA's original household waste exclusion and the preamble discussion of that exclusion. As the Solicitor General put it in its brief for the United States supporting Chicago's petition for *certiorari*:

Indeed, Section 3001(i)'s express provision that a qualifying resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" strongly suggests that EPA's household waste exclusion applies to all facets of the facility's operations, including incineration, pre- and post-incineration storage, and disposal of residues.

Brief of the United States as *Amicus Curiae* at 15, *City of Chicago v. EDF*, — U.S. —, 113 S. Ct. 486 (1992) (No. 91-1328).

**1. The statutory term "otherwise managing hazardous wastes" includes the management of ash.**

The term "otherwise managing hazardous wastes" is not specifically defined under RCRA, but there can be little doubt as to its breadth as used in Section 3001(i). First, and foremost, because Congress was, in enacting Section 3001(i), clarifying the 1980 household waste exclusion, Congress was clearly aware that the term "management" or "managing," in the context of household waste, had a well-defined meaning which included "residues remaining after treatment" of waste. Congress, in other words, used the same language in Section 3001(i) as EPA used in 1980 to define the scope of the household waste exclusion. If Congress wanted to depart from the scope of EPA's exclusion, it could have expressly narrowed that language.



Moreover, "management" is also the broadest activity described in Subtitle C; it comprises the entire range of activities relating to hazardous waste. Subtitle C, of which Section 3001(i) is a part, is entitled "Hazardous Waste Management" and includes sections dealing with identification and listing, 42 U.S.C. § 6921; generation, 42 U.S.C. § 6922; transportation, 42 U.S.C. § 6923; and treatment, storage and disposal of hazardous waste, 42 U.S.C. §§ 6924, 6925. The common sense reading of the phrase "or otherwise managing" is that it was intended to incorporate all these activities.

The term "hazardous waste management," although not identical to the phrase "otherwise managing hazardous wastes" in Section 3001(i), also supports this construction. It is defined broadly as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). "Hazardous waste management" covers what an RRF does with ash. The facility collects, stores, transports and disposes of the ash in a landfill.

**2. The statutory terms "disposing" and "storing" encompass the activities of a resource recovery facility regarding ash.**

The term "disposal" is also broadly defined in RCRA as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . ." 42 U.S.C. § 6903(3). This definition of "disposal" confirms the natural reading of the statute that the activity of placing ash residue into a landfill constitutes an excluded disposal activity under Section 3001(i). In the context of the operation of a resource recovery facility, placing ash in a landfill clearly fits within the meaning of the term "disposing" because the principal purpose of such a facility is to reduce the volume of solid waste by processing it to an ash residue prior to disposal.

The term "storage," when used in connection with hazardous waste, is defined in RCRA as "the containment

of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal . . . ." 42 U.S.C. § 6903(33). The inclusion of the term "storing" in Section 3001(i) can be read to encompass the ash handling practices at an RRF. Ash is accumulated, collected, and stored at an RRF prior to ultimate disposal in a landfill or beneficial reuse. Thus, by including the terms "storing" and "disposing" in the household waste exclusion, Congress meant to exclude from Subtitle C those activities of an RRF accompanying the handling of ash.

**3. EDF's reading of Section 3001(i) renders the statutory language meaningless.**

EDF makes two arguments regarding the plain meaning of the statutory language. First, EDF argues that Section 3001(i) merely exempts an RRF from being deemed a hazardous waste TSD facility for the receipt of hazardous wastes coming into the facility. Appellants' Brief at 25, *City of Chicago* (No. 90-3060); Appellant's Brief at 25, *Wheelabrator* (No. 90-7437). Second, EDF claims that RRFs "generate" the ash residue, and, since the statute does not specifically include the term "generating," it does not cover ash. *Id.* Both of these arguments are meritless.

EDF's first argument renders the statute meaningless. Section 3001(i), by its very terms, allows a facility to accept only household wastes and commercial and industrial wastes that are nonhazardous. Section 3001(i) does not apply to any facility that accepts waste that is regulated as hazardous. Because household waste has been excluded from regulation as hazardous since 1980, and because an RRF is not entitled to the benefit of Section 3001(i) if it accepts other wastes that are regulated as hazardous, EDF's argument deprives the statute of any meaning. As the Southern District held:

Under [EDF's] construction of Section 3001(i) it is difficult to understand what, if any, benefit the Facility derives from the exemption. Plainly, if the



Facility never accepts hazardous waste for processing, it would not be subject to regulation as a TSD facility even absent the exclusion.

725 F. Supp. at 763, n.12.

The Seventh Circuit made the same mistake as EDF when the majority stated cavalierly and without citation or foundation (because there is none):

Actually, Congress was interested in excluding from the extremely complex regulations that apply to facilities that specifically target hazardous waste municipal incinerators that inadvertently process hazardous materials that slip in with all the other junk.

948 F.2d at 347. In fact, there is not a shred of evidence that this was Congress's intent, and, more importantly, there is overwhelming evidence, discussed in the next section, that Congress's intent was, as all judges but two in the Seventh Circuit have held, to broaden the applicability of the household waste exclusion to RRFs that process nonhazardous waste from commercial and industrial sources together with household waste.

EDF's argument regarding the term "generating" is also meritless. As noted above, nowhere does the regulatory household waste exclusion mention "generation," but all parties—including EDF—agree that the regulatory exclusion covers the management of ash. Indeed, there was no need to include the term "generating" in Section 3001(i) for several reasons. First, the household waste exclusion covered all phases of management of the household waste stream, including management of ash, and because Congress was merely clarifying the applicability of that exclusion in 1984, there was no need to explicate any further what was already self-evident from the language and administrative history of the exclusion.

In addition, Congress may very well have felt that, as discussed above, management of ash was covered by the other statutory terms it used. As the Solicitor General put it:

The fact that Section 3001(i) fails to state that the facility shall not be deemed to be "generating" hazardous wastes does not undermine [the conclusion that the statute applies to all facets of the facility's operations]. The absence of that term likely reflects Congress's understanding that resource recovery operations involving conversion of solid waste to energy are comprehensively described by the collective terms it used. *See* RCRA § 1004(7) and (34), 42 U.S.C. 6903(7) and (34) (defining hazardous waste management and treatment).

United States' Brief at 15, *City of Chicago* (No. 91-1328).

In short, reading the statute as a whole, and in accord with the meaning that is most in harmony with its context and the ordinary meaning of its terms, ash is excluded from regulation as a hazardous waste under Section 3001(i).

**C. The Legislative History of Section 3001(i) Confirms That Congress Excluded Ash from Regulation as a Hazardous Waste at Resource Recovery Facilities Complying with the Requirements of the Exclusion.**

The unambiguous and incontrovertible legislative history of Section 3001(i), contained in the Senate Report that was adopted in total in the Conference Report, clearly confirms that Congress excluded ash from regulation as a hazardous waste at facilities meeting the requirements of the statute. As an initial matter *amici* are aware that under some circumstances some members of this Court have cautioned against use of legislative history to aid in statutory construction because of the inherent difficulty in determining Congressional "intent" and because of other perceived abuses use of such history entails.<sup>10</sup> Other justices have followed the more tradi-

<sup>10</sup> *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 474-75 (1989) (Kennedy, J., concurring in the judgment).

tional view that legislative history is useful to confirm the plain meaning of a statute, to help interpret an ambiguous statute, or to ensure that a literal reading of the plain meaning does not lead to a result that Congress could not have intended.<sup>11</sup>

In no event does this case involve an undisciplined use of legislative history. To the contrary, use of such history is particularly appropriate here. First, *amici* set forth below the *entire* legislative history of Section 3001(i); this is not a case where a litigant selectively quotes “snippets of analysis,”<sup>12</sup> nor is it an instance where, in the words of Judge Harold Leventhal, a litigant looks out over a “crowd” of legislative history in search of “friends.”<sup>13</sup>

<sup>11</sup> See e.g., *Conroy Aniskoff*, — U.S. —, 113 S. Ct. 1562, 1565-66 (1993) (Stevens, J.) (using legislative history to confirm interpretation of the plain language of the Soldiers' and Sailors' Relief Act of 1940); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Blackmun, J.) (using legislative history of eighth amendment to determine that Excessive Fines Clause does not cover punitive damages in civil suits); *Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 489 U.S. 782, 790-91 (1989) (O'Connor, J.) (using legislative history to interpret meaning of term “prevailing party” for purposes of obtaining attorneys fees under § 1988); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 214-15 (1989) (Kennedy, J.) (interpreting ambiguous provision of the Medicare Act and using legislative history directly on point to resolve the issue); *Local Union 1261 v. Federal Mine Safety Commission*, 917 F.2d 42, 44-46 (D.C. Cir. 1990) (Ginsburg, J.) (noting that the meaning of language in the Federal Mine Safety and Health Act providing compensation for mines closed by federal safety inspectors was not “plain” and reviewing the legislative history for guidance); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U.L. Rev. 277, 286-300 (1990).

<sup>12</sup> See *Blanchard v. Bergeron*, 489 U.S. at 99 (Scalia, J., concurring in part and concurring in the judgment) (Judges should not give legislative force to each snippet of analysis found in committee reports).

<sup>13</sup> *Conroy v. Aniskoff*, — U.S. —, 113 S. Ct. at 1567 (citing J. Leventhal).

Second, as shown below, the legislative history in this instance directly addresses Congress's intent in enacting Section 3001(i);<sup>14</sup> it is contained in a Senate Report that was adopted as the Conference Report;<sup>15</sup> and it is undisputed—there are no competing contemporaneous reports, floor statements or the like.

Finally, all justices of this Court agree that legislative history may be used to interpret the meaning of a statutory term that is “most compatible with the surrounding body of law into which the provision must be integrated.” *Green v. Bock Laundry Machine Co.*, 490 U.S. at 528 (Scalia, J., concurring in the judgment). Here, the legislative history confirms that, as discussed above, EDF's and the Seventh Circuit's reading of Section 3001(i) turns the statute entirely on its head—a amendment that was intended to promote resource recovery by broadening the applicability of the household waste exclusion is held instead to create impediments to resource recovery by narrowing it. The dual goals of RCRA in general and Section 3001(i) in particular—protecting the environment and promoting resource recovery—are completely incompatible with EDF's reading that ash must be subject to costly and unnecessary Subtitle C regulation.

<sup>14</sup> *Pacific Gas & Electric Co. v. State Energy Resources, Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983) (relying on House Committee Report directly addressing preemption issue to decide preemption question).

<sup>15</sup> Conference committee reports are generally considered the most reliable forms of legislative materials. See *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) (noting that “[w]e have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.”). See also, George A. Costello, *Average Voting Members and Other “Benign Fictions”: the Relative Reliability of Committee Reports, Floor Debates, and Other sources of Legislative History*, 1990 Duke L.J. 39, 41-43 (1990).



**1. The Senate Report provisions addressing Section 3001(i), which were adopted in total in the Conference Report, confirm that ash is excluded from regulation as a hazardous waste.**

The Senate Report for Section 3001(i) first indicates precisely Congress's intent to clarify the scope of the household waste exclusion for RRFs. The Report also confirms that EPA's household waste exclusion was established to exclude waste streams generated by households and by sources whose wastes are similar to households as stated in the 1980 Preamble:

The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (see Appendix at 1a-2a).

The Senate Report then acknowledges the reason for the enactment of Section 3001(i)—that RRFs accept nonhazardous wastes from sources other than households, and that it is important to encourage such facilities and to remove statutory or regulatory ambiguities that may hinder their development:

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation.

*Id.*

The Report then sets forth the specific intent of Section 3001(i), namely that it:

*... clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.*

*Id.* (emphasis added). The phrase "activities of a resource recovery facility" includes all activities; it is not limited, as EDF would have it, to only some activities of an RRF. Moreover, the Report clearly states that it was Congress's original intent to include such activities within the scope of the exclusion, and Section 3001(i) is merely clarifying that original intent.

Finally, the Report concludes that all waste management activities of the RRF are excluded from hazardous waste regulation, including the term "generation" to which EDF and the Seventh Circuit ascribe such importance.

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

*Id.*<sup>16</sup> The Conference Committee adopted, without change, the provision proposed by the Senate.<sup>17</sup> This leg-

<sup>16</sup> The Senate Report also provides that a facility that has in place the precautionary measures against unintended acceptance of hazardous waste should not be penalized for the "occasional, inadvertent receipt and burning of hazardous material" from commercial or industrial sources. *Id.*

<sup>17</sup> SECTION 223—CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION

House Bill.—No provision.

*Senate amendment.*—The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous



islative history confirms that ash from RRFs that meet the requirements of Section 3001(i) will not be regulated as a hazardous waste. As the Southern District held, the "Senate Report could not be more explicit." 725 F. Supp. at 765.

**2. The Seventh Circuit majority and EDF misread the legislative history of Section 3001(i).**

Two judges in the Seventh Circuit reference only the one line from the Senate Report that mentions the word "generation" and conclude that they will not "rely upon a single word in a committee report that did not" make its way into the statutory language. *City of Chicago*, 948 F.2d at 351. The flaw in this reasoning is that it ignores entirely the rest of the Senate Report in which Congress explains in detail the scope and purpose of the 1984 exclusion. The legislative history does not consist of only "one word."<sup>18</sup>

EDF argued in the Second Circuit that the legislative history demonstrates that Congress rejected "a waste stream exemption in favor of an exemption of specific and limited activities," or, put slightly differently, that Congress abandoned EPA's "expansive 'waste stream' approach in favor of a narrower exclusion." Appellant's Brief at 20, 26, *Wheelabrator* (No. 90-7437); Appellants' Brief at 20, 26, *City of Chicago* (No. 90-3060). This argument is made up out of whole cloth. There is no support for it in the language or legislative history of

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commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

*Conference substitute.*—The Conference substitute is the same as the Senate amendment.

H.R. Conf. Rep. No. 1133, 98th Cong., 2nd Sess. 79, 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5649, 5677.

<sup>18</sup> See *Mead Corp. v. B.E. Tilley*, 490 U.S. 714, 723 (1989) (noting that the deletion of a single word, the word "accrued," in Conference Committee amendments did not evince "an intent to require the provision of unaccrued as well as accrued benefits"; the Court interpreted the statute to apply only to accrued benefits despite the omission of that term).

the statute. To the contrary, the Senate Report, adopted as the Conference Report, expressly states that other non-hazardous "waste streams" should be included within the scope of the exclusion. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Indeed, as the Southern District put it, "Nowhere in the 1984 exclusion, nor in the Committee report which accompanied it, is there any hint of a congressional intent to limit the scope of that earlier [household waste] exclusion." 725 F. Supp. at 765.

If Congress had intended to exempt a narrower set of activities under Section 3001(i) than household waste "in all phases of its management" as provided in the 1980 Preamble, Congress would undoubtedly have said so in order to ensure that there would be no confusion between the regulatory and statutory exclusions. Congress did not do so.

Instead, Congress chose explicitly to "clarify" that an existing regulatory exclusion should apply to an important category of plants—resource recovery facilities—that burn household and similar wastes, as long as those facilities complied with new prophylactic requirements. This is not, in other words, a case in which the Court must struggle to interpret the meaning of congressional failure to address an agency's interpretation of a rule;<sup>19</sup> rather, this is a case in which Congress stated unequivocally its intent to affirm an agency rule, and to clarify that the rule—which clearly covered management of ash—should be applied to RRFs that accept nonhazardous municipal wastes together with household wastes.

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<sup>19</sup> See *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"). Cf. *Haig v. Agee*, 453 U.S. 280, 297 (1981) (holding that Congress adopted an administrative construction in a reenacted statute where Congress used the same language as the previous statute and legislative history revealed that Congress was aware of a longstanding administrative interpretation of that provision).

In addition, EDF and the Seventh Circuit's analysis would lead to the anomalous result that ash from incinerators, including RRFs, that accept only household waste is excluded from regulation as a hazardous waste, while ash from RRFs that process the same type of waste streams and that meet the contractual, inspection and notification requirements of Section 3001(i) is not excluded from Subtitle C. There is no support for this reading in the language or legislative history of the statute, and in fact, such a reading is precisely the opposite of what Congress intended. EDF's reading would, to use the words of the Senate Report, "discourage" rather than "encourage" commercially viable RRFs, and it would "create" rather than "remove" impediments that may hinder the development and operation of RRFs.

Finally, EDF argues that the 1984 Hazardous and Solid Waste Amendments universally broadened the reach of the RCRA program by requiring more wastes to be regulated as hazardous and by imposing more stringent requirements on hazardous waste regulation, and thus Section 3001(i) must be read as a narrowing of the household waste exclusion. See Appellants' Brief at 27-30, *City of Chicago* (No. 90-3060); Appellant's Brief at 27-30, *Wheelabrator* (No. 90-7437).<sup>20</sup> Congress did not, however, make less stringent the regulation of RRFs in 1984; it merely clarified that Congress had always intended the household waste exclusion to extend to a broader category of RRFs that received and burned nonhazardous commercial and industrial wastes. Moreover, Congress imposed additional restrictions on RRFs that were not previously embodied in the household waste exclusion.

<sup>20</sup> EDF virtually ignored, however, both the legislative and regulatory history of Section 3001(i) and the history of Congress' expressed desire to promote resource recovery facilities. EDF's argument is therefore irrelevant. See *Board of Governors of Federal Reserve System v. Dimension Finance Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action").

In order to be eligible for the exclusion, RRFs must have adequate contractual arrangements, inspection procedures, or other notification requirements to ensure that hazardous waste is not received and burned. 42 U.S.C. § 6921(i)(2). Section 3001(i) did not, in other words, relax existing requirements, but rather clarified their scope and imposed additional restrictions.

## II. EPA INTERPRETS THE STATUTE TO EXCLUDE ASH FROM REGULATION AS A HAZARDOUS WASTE AT QUALIFYING RESOURCE RECOVERY FACILITIES.

An agency's construction of the statute it administers is only consulted when Congress's intent regarding the provision at issue is unclear. Where Congress has directly addressed the point at issue, and its intent is clear from the plain meaning of the statute and the legislative history, deference to an agency interpretation is not required. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1974). As set forth above, Congress directly excluded ash from regulation as a hazardous waste. Therefore, any interpretation by EPA contradicting Congress's express intent would be entitled to no deference. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

However, in the Reilly Memorandum EPA takes the formal position that the statutory language and legislative history of Section 3001(i) support the interpretation that the exclusion covers ash. Reilly Memorandum at 1.<sup>21</sup> The Reilly Memorandum cites policy considerations, including protecting the environment, promoting resource recovery from nonhazardous solid waste, promoting energy recovery, and reducing the volume of wastes disposed of in

<sup>21</sup> The Reilly Memorandum explicitly invalidated all prior EPA positions on ash from RRFs. Reilly Memorandum at 1. Thus, EDF's strenuous reliance on the preamble to EPA's 1985 regulation in all its briefs in this and the Second Circuit cases is no longer valid. See, e.g., Appellant's Brief at 32, *Wheelabrator* (No. 90-7437); Appellants' Brief at 32, *City of Chicago*, (No. 90-3060), citing 50 Fed. Reg. 28,702, 28,725-26 (1985).



landfills, to support its view that ash is not subject to regulation under Subtitle C. Reilly Memorandum at 5-6. Accordingly, EPA's formal position on the regulatory status of ash is in full harmony with the statutory language and legislative intent.

### CONCLUSION

For all the reasons discussed above, the Seventh Circuit's decision should be reversed, and this Court should hold that ash is not subject to regulation as a hazardous waste under RCRA. The entire "household" waste stream, together with nonhazardous waste from other sources that is similar in composition to household waste, is exempt from the moment it is put out on the curb until it is ultimately disposed of as ash residue from an RRF.

Respectfully submitted,

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### APPENDIX

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983)

\* \* \* \*

#### [61] CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION

The reported bill adds a subsection (d) to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under section 3001.

Second, such facilities cannot accept hazardous wastes identified or listed under section 3001 from commercial



or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste.

No. 92-1639

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES,  
U.S. CONFERENCE OF MAYORS, NATIONAL  
GOVERNORS' ASSOCIATION, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
NATIONAL ASSOCIATION OF COUNTIES, COUNCIL  
OF STATE GOVERNMENTS, AND NATIONAL  
INSTITUTE OF MUNICIPAL LAW OFFICERS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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### **QUESTION PRESENTED**

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste," exempts from hazardous waste regulation the ash residue remaining from the burning of municipal solid waste at such a facility.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1639

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CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES,  
U.S. CONFERENCE OF MAYORS, NATIONAL  
GOVERNORS' ASSOCIATION, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
NATIONAL ASSOCIATION OF COUNTIES, COUNCIL  
OF STATE GOVERNMENTS, AND NATIONAL  
INSTITUTE OF MUNICIPAL LAW OFFICERS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**INTEREST OF THE *AMICI CURIAE***

*Amici*, organizations whose members include municipal, county, and state governments and officials throughout the United States, have a compelling interest in legal issues that affect local and state governments. *Amici* have a manifest interest in the legal issues pertaining to the responsible and efficient disposal of municipal solid waste ("MSW") since waste disposal is typical of the services

performed by state and local governments in discharging their functions of administering the public law and furnishing public services.

Jurisdictions around the country, faced with the prospect of diminishing MSW landfill capacity, increasing landfill tipping fees, greater difficulties in siting new landfills, and increased energy demand, have invested heavily in resource recovery and combustion systems to manage MSW and serve energy needs. In addition to their fiscal interest in the issue presented, *amici* also have an interest in preserving the ability of municipalities to address local environmental issues. Because of the importance of the question presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.<sup>1</sup>

## INTRODUCTION AND SUMMARY OF ARGUMENT

### A. Resource Recovery Is A Critical Aspect Of MSW Management

This country faces a severe problem in managing its municipal garbage, principally attributable to two factors. First, the amount of MSW generated in the U.S. is increasing. Between 1988 and 1990, MSW generated in the U.S. increased by 8%, from 180 million tons per year to 195.7 million tons per year.<sup>2</sup> The EPA has recently estimated an increase of 13% in MSW generation by the year 2000, to a total of 222 million tons per year.<sup>3</sup>

<sup>1</sup> The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

<sup>2</sup> See U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019, ES-3 (July 1992) (hereinafter *EPA 1992 Update*); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/50-SW-042, ES-3 (June 1990) (hereinafter *EPA 1990 Update*).

<sup>3</sup> See *EPA 1992 Update* at ES-3.

Second, MSW landfill space, a finite resource, is becoming scarcer. While there were approximately 10,000 operating MSW landfills in 1970, only approximately 6,500 remained in operation by 1988.<sup>4</sup> Moreover, many of these landfills will be forced to close as a consequence of regulations promulgated by the EPA in 1991.<sup>5</sup> The combination of these two factors has led to an emerging national MSW landfill capacity shortage.<sup>6</sup>

Incineration plays a significant role in MSW management. In 1938, approximately 600 to 700 cities and towns burned their garbage and rubbish.<sup>7</sup> However, use of incineration waned as landfilling became more economical, and by 1970 only 160 incinerators and resource recovery facilities were in operation.<sup>8</sup> Today, resource recovery facilities and incinerators have again become a vital part of the MSW management system and are increasingly important due to the shortage of landfill space. Incineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%.<sup>9</sup> Incineration burns away

<sup>4</sup> *Solid Waste Disposal Facility Criteria* (Final Rule) 56 Fed. Reg. 50,978, 50,988 (1991); U.S. Environmental Protection Agency, *Report to Congress, Solid Waste Disposal in the United States*, EPA/530-SW-88-011A, Executive Summary at 1 (October 1988).

<sup>5</sup> See 56 Fed. Reg. 50,992 (1991).

<sup>6</sup> National Solid Waste Management Association, *Landfill Capacity in the Year 2000*, at 4 (1989) ("[D]isposal requirements will exceed existing capacity by around 1998."). Although recently, due to the economic recession and greater efforts at recycling, the rate at which landfill space is diminishing has decreased, long-term projections of landfill scarcity are well-founded.

<sup>7</sup> Martin V. Melosi, *Garbage in the Cities* 217 (1981).

<sup>8</sup> *Id.*

<sup>9</sup> Homer A. Neal & J.R. Schubel, *Solid Waste Management and the Environment—The Mounting Garbage and Trash Crisis* 117 (1987).



the organic (carbon based) compounds in the MSW, leaving the non-burnable metal components of the original MSW concentrated in the reduced volume of ash which is the treatment residue.<sup>10</sup> Jurisdictions which burn portions of the MSW stream and then landfill the ash residue reduce their landfill tipping fees and transportation costs significantly. As of November 1992, 176 resource recovery facilities and incinerators burned nearly 34 million tons of MSW annually, or 17% of the nation's total MSW stream.<sup>11</sup> If the 49 projects that are currently inactive or in the planning and construction stages are completed and become operational, capacity will increase to approximately 47 million tons per year, or 21% of the estimated total volume of MSW that will be generated in the year 2000.<sup>12</sup>

In addition to reducing use of landfill space, resource recovery facilities provide other substantial environmental and economic benefits. The EPA has concluded that the resource recovery process is environmentally safer and, therefore, preferable to the landfilling of MSW.<sup>13</sup> Resource recovery facilities and incinerators must comply with strict emissions requirements promulgated pursuant to the Clean Air Act.<sup>14</sup> Moreover, EPA's recent promulga-

<sup>10</sup> The only potentially environmentally threatening components in the MSW ash—unburnable metals such as lead and cadmium—are not created by the incineration, but exist in the untreated MSW, which can be lawfully disposed of in a Subtitle D landfill.

<sup>11</sup> Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age, Nov. 1992, at 28.

<sup>12</sup> *Id.* at 30.

<sup>13</sup> See EPA 1992 Update at 1-4; EPA 1990 Update at 4.

<sup>14</sup> See Walter R. Niessen, *Municipal Waste Combustors: Environmentally Sound Power Plants*, Solid Waste & Power, Jan./Feb. 1993, at 12 ("Municipal waste combustors are required to meet some of the toughest environmental air emission standards in the country. Complying with these standards makes modern waste combustors among the cleanest producers of electricity.").

tion of more stringent requirements to govern Subtitle D non-hazardous waste landfills receiving MSW ash has contributed to the increased safety of MSW ash disposal.<sup>15</sup> Recent field studies of ash and leachates from ash monofills show that lead and cadmium in MSW ash do not pose a significant threat to the environment or to public health and safety.<sup>16</sup> These studies indicate that with appropriate management, MSW ash is safe for re-use in applications such as substitute material in cement, in road

<sup>15</sup> See 40 C.F.R. pt. 258 (1992); 56 Fed. Reg. 51,000-15 (1991). These more stringent requirements include: location restrictions; stricter operating requirements such as covering disposals; record-keeping and controlling run-off; better design criteria that include denser liners and leachate collection systems; groundwater monitoring; and closure and post-closure care. Given the stricter standards for ash monofills, EPA has determined that MSW ash can be regulated under Subtitle D in a manner that "protects both the environment and public safety." See Memorandum from William K. Reilly, Administrator, U.S. EPA, to All Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 4 (September 18, 1992) (hereinafter MWC Ash Memorandum) (reprinted as Appendix to Brief for the United States as Amicus Curiae, No. 91-1328). See also U.S. Environmental Protection Agency, *Environmental Fact Sheet*, EPA/50-W-0-29C (April 1990) (hereinafter Fact Sheet) ("The disposal of ash in a well-designed monofill greatly reduces the leachability of constituents of concern such as lead and cadmium.").

<sup>16</sup> Prior studies of MSW ash were based on laboratory testing. However, ash taken directly to a laboratory for analysis does not behave in the same way as ash disposed of in monofills or ash prepared for re-use. See Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power, Sept./Oct. 1992, at 18. Field tests show that MSW ash exhibits an encapsulating quality such that potentially harmful constituents like cadmium and lead bind up in the ash and are not released into the environment. *Id.* at 20. Moreover, heavy metal concentrations in ash diminish over time and recent studies show that leachate values from ash monofills approximate EPA's Primary Drinking Water Standards. *Id.*

construction, as daily cover for MSW landfills, or as a monofill liner.<sup>17</sup>

Another benefit of resource recovery facilities is the significant economic advantage they provide in the energy field. One ton of MSW burned in a resource recovery plant provides enough energy to light one thousand 100-watt light bulbs for one hour, power 500 hair dryers for one hour, or furnish electricity to an average apartment for one month.<sup>18</sup> Over 31 million tons of MSW are burned annually, producing enough energy to power the equivalent of 1.3 million homes, an increase of approximately 18% since 1990.<sup>19</sup> The EPA forecasts that between 1991 and 2010, the generation of electricity from MSW combustion will increase seven-fold.<sup>20</sup> Moreover, a portion of the energy generated by resource recovery facilities is used to operate the plants themselves, making the facilities self-sufficient. The remainder is sold and the proceeds applied to the facilities' operating expenses, further reducing the cost of MSW disposal to local governments.

**B. Requiring MSW Ash To Be Managed As A Subtitle C Waste Substantially Raises The Cost Of MSW Disposal And Renders Resource Recovery Facilities Economically Unviable**

The decision below requires that resource recovery facility operators dispose of MSW ash only at landfills which have obtained applicable state or federal hazardous waste treatment, storage and disposal permits under the strict requirements of Subtitle C of RCRA, 42 U.S.C.

<sup>17</sup> *Id.* at 24.

<sup>18</sup> Neal & Schubel, *supra* note 9, at 108.

<sup>19</sup> B. Kent Burton & Jonathan V.L. Kiser, *Energy from Municipal Waste: Picking Up Where Recycling Leaves Off*, Waste Age, Nov. 1992, at 38.

<sup>20</sup> U.S. Department of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

§§ 6924, 6925. At a time when many of the nation's cities are in the midst of serious fiscal crises, the court of appeals' decision exacerbates this situation by substantially raising the costs of MSW disposal.<sup>21</sup> As a consequence of the stricter requirements imposed by Subtitle C, the cost of disposing of MSW ash in a hazardous waste landfill is substantially greater than it is in either MSW landfills or in ash monofills. According to the EPA, the national average cost of disposing of MSW ash in a Subtitle D landfill is \$42 per ton, while the national average cost of disposing of MSW ash in a Subtitle C landfill is \$453 per ton. MWC Ash Memorandum at 7.

Municipalities have chosen resource recovery as an integral part of their waste management programs because of its long term economic and energy benefits, and because it is environmentally safer than landfilling MSW. But even with these benefits, municipalities will not be able to absorb the dramatic increase in operating costs that will result if MSW ash must be disposed of in Subtitle C facilities. Furthermore, if all the MSW ash currently produced (some 8.5 million tons annually) is diverted to hazardous waste landfills, hazardous waste landfill charges are likely to increase significantly because of the added demand for limited hazardous waste landfill ca-

<sup>21</sup> A 1991 study by the National League of Cities documents the financial plight of the cities. Almost 61% of the cities surveyed reported that 1991 general fund expenditures were expected to exceed revenues; over 26% said that expenditures would exceed revenues by more than 5%. National League of Cities, *City Fiscal Conditions in 1991*, at iii (1991) (*City Fiscal Conditions*). In the period 1988-1990, municipal solid waste management costs rose at a rate 30% greater than city revenues. U.S. Dept. of Commerce, *City Government Finances 1989-1990*, at 1. As a consequence, 66.3% of the cities responding to the NLC survey reported that the cost of solid waste disposal was one factor beyond their control contributing to fiscal difficulties. *City Fiscal Conditions* at 31. Over 10% of cities reported that landfill, refuse, solid waste and recycling expenses comprise the single factor that most adversely affects city expenditures. *Id.* at 7.



capacity.<sup>22</sup> Only one hazardous waste landfill has been sited since 1987,<sup>23</sup> and there are only 20 hazardous waste landfills throughout the country.<sup>24</sup> See generally *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2011-12 (1992).

The fiscal consequences of requiring MSW ash to be disposed of in Subtitle C hazardous waste landfills are best illustrated by representative examples from various communities. Hennepin County, Minnesota has advised *amici* that its estimated cost to dispose of MSW ash as a hazardous waste is \$150 to \$200 per ton. This is three to four times the \$50 per ton which the county pays for ash disposal in a MSW landfill or monofill. Moreover, the cost is approximately six to seven times the national average for tipping fees at MSW landfills, which is \$26.56 per ton.<sup>25</sup> New York City, which incinerates over one million tons of MSW annually, estimates that its disposal cost per ton would increase from approximately \$100 to over \$300 if MSW ash is designated as hazardous. This would increase New York's MSW disposal costs by over \$200 million per year. By way of comparison, its cost of diverting the MSW waste stream directly to a MSW landfill without any incineration is only \$30 per ton.<sup>26</sup>

<sup>22</sup> At the end of 1987 the United States had an estimated 34 million tons of hazardous waste landfill capacity. *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Energy and Commerce, 101st Cong., 1st Sess. 198* (1989).

<sup>23</sup> Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest, Mar. 1992, at 24.

<sup>24</sup> William Gruber, *TSD Summary 1993*, EI Digest, Jan. 1993, at 14, 17.

<sup>25</sup> Landfill Capacity in the Year 2000, *supra* note 6, at 4.

<sup>26</sup> Akron, Ohio, estimates that the cost of landfilling one ton of MSW is \$50; the cost of incinerating one ton of MSW and landfilling the ash in a MSW landfill is \$57; and the cost of incinerating one ton of MSW and disposing of the ash in a hazardous waste landfill is \$92. Thus, for Akron, it would cost almost twice as much to burn a ton of MSW and take the residue to a hazardous waste

As these examples show, affirmance of the court of appeals' decision will substantially increase the costs of MSW disposal. It will also create a great economic disincentive to the development of new resource recovery facilities. The 40 plants currently in the planning or construction stages involve enormous development costs; as one authority has noted, in 1985 the cost of building a resource recovery facility capable of processing 1000 tons of MSW per day was \$80 million.<sup>27</sup> *Solid Waste Management and the Environment*, *supra* at 117. The surcharge imposed by requiring MSW to be disposed of under Subtitle C can only lead to the cancellation of those facilities not yet completed and jeopardize the economic viability of existing facilities.

### C. Summary Of Argument

1. The plain language of § 3001(i) manifests Congress's intent to exclude the entire MSW stream from regulation as a hazardous waste under RCRA's Subtitle C. The court of appeals' construction misapprehends the import of the inclusion by Congress in § 3001(i) of the terms "treating," "disposing of," and "managing." Not only does § 3001(i)'s use of these terms demonstrate that Congress intended to exempt the MSW waste stream from

landfill than to simply dispose of the untreated MSW in a sanitary landfill. For Marion County, Oregon, landfilling MSW ash as a hazardous waste would almost double the cost of MSW disposal, raising it from the current cost of \$46.95 per ton to \$80.10 per ton. This can be compared with its cost of \$36 per ton to send MSW directly to a landfill.

<sup>27</sup> The jurisdictions with publicly owned resource recovery facilities in the advanced planning or construction stages include: Lisbon, Connecticut; Lee County, Florida; Montgomery County, Maryland; Oakland County, Michigan; Dakota County, Minnesota; St. Louis, Missouri; Mercer County, New Jersey; Monmouth County, New Jersey; Morris County, New Jersey; Union County, New Jersey; Mecklenburg County, North Carolina; Montgomery County, Pennsylvania; Kingston, Rhode Island; Johnston, Rhode Island; Nashville, Tennessee; and Brazoria County, Texas. *The 1992 Municipal Waste Combustion Guide*, Waste Age, Nov. 1992, at 56.



Subtitle C regulation, the very process of incineration falls within the statutory definition of "treating," which is specifically exempted from regulation under Subtitle C. Moreover, a resource recovery facility's subsequent disposal of MSW ash residue is also exempt from regulation under Subtitle C because it involves the statutorily exempt activity of "disposing of" residue.

2. The history of § 3001(i) supports this conclusion. In 1980, EPA, while recognizing that MSW might contain a small amount of hazardous waste, promulgated the Household Waste Exclusion Rule which excluded the entire MSW waste stream from regulation under Subtitle C. *See* 45 Fed. Reg. 33,084, 33,120 (1980). Congress's subsequent enactment of § 3001(i) expressly ratified the Household Waste Exclusion Rule and its exemption of the entire MSW stream from regulation under Subtitle C. As the Senate Report stated, "[a]ll waste management activities of . . . [a resource recovery] facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . ." S. Rep. No. 284, 98th Cong., 1st Sess 61 (1983).

3. Congress's purpose in exempting "resource recovery facilit[ies] recovering energy" in § 3000(i) was to promote the development of such facilities. The decision below undermines this purpose by substantially raising the cost of disposal of ash residue. As the EPA has noted, the national average cost for disposal of ash in a Subtitle D (non-hazardous waste) landfill is \$42 per ton; the national average cost for disposal of ash in a Subtitle C (hazardous waste) landfill is \$453 per ton. MWC Ash Memorandum at 7. The Seventh Circuit's rule places a crippling surcharge on the cost structure of resource recovery facilities which is likely to render many facilities economically unviable, thereby contravening the congressional purpose.

4. Finally, if the Court concludes that Section 3001(i) is ambiguous, the Court should nonetheless defer to the

EPA's reasonable interpretation of the statute as set forth in the 1992 MWC Ash Memorandum. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals' refusal to accord deference—assertedly because of EPA's "waffling," Pet. App. at 16—mischaracterizes the EPA's position, which has consistently been that MSW Ash is not subject to regulation under Subtitle C. *See* 50 Fed. Reg. 28,702, 28,726 (1985). It also ignores the teaching of this Court that an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. Here, to the extent EPA has changed its position at all, it has done so in response to new scientific and administrative developments. *See* 40 C.F.R. pt. 258 (1992); MWC Ash Memorandum at 5 & n.5.

## ARGUMENT

### THE COURT OF APPEALS' INTERPRETATION OF SECTION 3001(i) CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND CONGRESS'S PURPOSE IN ENACTING IT

As in any case of statutory construction, interpretation of § 3001(i) "begins with the language of the statute itself." *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 558 (1990). The usual "assumption [is] that the legislative purpose is expressed by the ordinary meaning of the words used." *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984). However, "[i]n determining the meaning of [a] statute, [the court must] look not only to the particular statutory language, but [also] to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The court of appeals held that § 3000(i) does not exempt MSW ash "generated" during management of the

waste stream from Subtitle C regulation. The court of appeals' construction is erroneous, however, because it ignores the import of the inclusion by Congress in § 3001(i) of the express statutory terms "treating," "disposing of" and "managing." The court of appeals' construction contravenes not only the plain language of the statute but also Congress's object and policy in enacting RCRA: that the entire MSW waste stream be excluded from regulation under Subtitle C in order to encourage the development and use of resource recovery facilities.

**A. MSW Ash Is A Treatment Residue That Is Excluded From Subtitle C Regulation Under The Express Terms Of Section 3001(i)**

In 1976 Congress enacted RCRA,<sup>28</sup> thereby overhauling the management of wastes in the United States. See 42 U.S.C. §§ 6901 *et seq.* Subtitle C of RCRA establishes a scheme for regulating hazardous wastes from "cradle to grave." *Environmental Defense Fund v. Environmental Protection Agency*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1120 (1989). This scheme involves regulation of hazardous wastes along a continuum, or "waste stream," composed of the generation,<sup>29</sup> transportation, treatment,<sup>30</sup> storage, and disposal<sup>31</sup> of the hazardous waste.<sup>32</sup>

Congress, however, recognized that even the hazardous wastes contained in MSW could be treated in an envi-

<sup>28</sup> Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat.) 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992(k)).

<sup>29</sup> In the context of hazardous waste, "generation" is defined as "[t]he act or process of producing hazardous waste." See RCRA § 1004(34), 42 U.S.C. § 6903(6).

<sup>30</sup> RCRA § 1004(34), 42 U.S.C. § 6903(34).

<sup>31</sup> RCRA § 1004(3), 42 U.S.C. § 6903(3).

<sup>32</sup> Subtitle D of RCRA provides a similar cradle to grave regulatory framework for non-hazardous wastes. See 42 U.S.C. §§ 6941-49.

ronmentally sound and financially less burdensome manner than is required by Subtitle C. Accordingly, Congress enacted Section 3001(i), which establishes an exclusion from Subtitle C regulation for resource recovery facilities that burn MSW in order to recover energy, as long as certain requirements are met. Section 3001(i) provides in relevant part:

[A] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be *treating*, storing, *disposing of*, or otherwise *managing* hazardous waste material for the purpose of regulation under this chapter.

42 U.S.C. § 6921(i) (emphasis added). Congress thus exempted the operation of resource recovery facilities burning MSW to recover energy from RCRA's Subtitle C regime regulating the management of hazardous wastes, regardless of the characteristics of the waste being burned.

Respondents contend, *see* Op. Cert. 13-16, and the court of appeals held, *see* Pet. A. 18-20, that notwithstanding the express language of § 3001(i), petitioners must dispose of ash generated during the incineration of MSW as a hazardous waste under RCRA's Subtitle C. According to respondents and the court below, where the incineration of MSW "generates" a new hazardous waste, § 3001(i) requires incinerator ash to be managed as a hazardous waste under RCRA Subtitle C. This reading of § 3001(i), however, is contradicted by the statute's express use of language—"treating, storing, disposing of, or otherwise managing," 42 U.S.C. § 6921(i)—which manifests Congress's intent to exempt from regulation as a hazardous waste the entire MSW waste stream from generation by households through the post-incineration disposal of the ash residue.

Under RCRA, a material becomes a "solid waste" at the time it is first *discarded*. See 42 U.S.C. § 6903(27) (defining "solid waste" as "any garbage, refuse, . . . and other discarded material"); *cf. American Mining Congress*



*v. Environmental Protection Agency*, 824 F.2d 1177, 1193-94 (D.C. Cir. 1987).<sup>33</sup> MSW, including any hazardous waste component contained therein, is thus generated as a "solid waste" at the moment a person or business puts garbage out for pickup by a waste hauler for transport to a resource recovery facility.

Likewise, the next step in the process of managing the waste stream—the incineration or thermal treatment of MSW at the resource recovery facility—does not result in the "generation" of a new hazardous waste subject to regulation under RCRA's Subtitle C. To be sure, at this stage in the MSW stream, the most significant changes occur in the physical and chemical composition of MSW.<sup>34</sup> To the extent that incineration "generates" a new haz-

<sup>33</sup> RCRA § 1004(5), 42 U.S.C. § 6903(5), defines hazardous waste as a subset of solid waste. 40 C.F.R. §§ 261.2 and 261.3 (1992) set forth, respectively, the regulatory definitions of solid and hazardous waste.

<sup>34</sup> In this process, organic, carbon-based, compounds are decomposed, leaving an ash containing a non-burnable metallic residue. This ash is not a newly "generated" waste, but the residue of a process which changed the physical and chemical composition and character of the MSW. The metallic constituents of the ash are the same as the metallic constituents of the MSW received by the facility; they are simply concentrated into a volume approximately one-tenth as large because the organic compounds have been burned away. Because of the concentration of metals in the ash, the ash may sometimes demonstrate "toxicity," a characteristic of hazardous waste, when tested using EPA's Toxic Characteristics Leaching Procedure ("TCLP"). See 40 C.F.R. § 261.24 and pt. 261 App. II (1992). TCLP is a test of the concentration at which metals such as lead and cadmium will leach from a material. See *Edison Elec. Inst. v. Environmental Protection Agency*, Nos. 90-1320-1324, slip op. at 6-8 (D.C. Cir. Aug. 6, 1993) (describing TCLP). Because the concentration at which metals leach from a material is likely to be greater the higher the concentration of metals in a material, burning away the organic compounds in MSW increases the likelihood that the concentration of leachate in the ash residue will exceed the TCLP test. As explained *supra* at p. 5 n.16, however, recent field studies indicate that the lead and cadmium concentrated in MSW ash do not pose a significant leachate problem.

ardous waste, however, Congress has expressly exempted this process from regulation under Subchapter C. See 42 U.S.C. § 6921(i). Having defined "treatment" as "any method, technique or process . . . designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, *safer for transport, amenable for recovery, amenable for storage, or reduced in volume*," 42 U.S.C. § 6903(34) (emphasis added)—language which plainly encompasses the process of incineration—Congress has clearly expressed its intent to exclude ash residue from regulation as a hazardous waste under Subtitle C, regardless of its characteristics. As the plain language of § 6903(24) demonstrates, the "treatment" of hazardous waste does not include only those processes which render the waste "nonhazardous." Rather, it also encompasses those processes which do not render the waste "nonhazardous" so long as they "change the physical, chemical, or biological character or composition . . . so as to render such waste . . . safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(24). Congress was thus clearly aware that not all processes used to treat hazardous waste render that waste "nonhazardous." Nonetheless, in enacting § 3001(i), it chose to exempt the "treatment" of MSW from Subtitle C.

Accordingly, for purposes of RCRA, in incinerating MSW and producing ash a resource recovery facility is *treating* pre-existing municipal solid waste that has already been generated, not creating a new hazardous waste. And foreshadowing Congress's intent in enacting § 3001(i), EPA properly described MSW ash as a "treatment residue." See 45 Fed. Reg. 33,084, 33,099 (1980) ("[Residues] remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.").

The resource recovery facility's disposal of MSW ash in a landfill after mass burning is likewise within the scope



of the § 3001(i) exemption. In the ordinary course of the “mass burning” of MSW, a resource recovery facility does not engage in the “discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water . . . .” 42 U.S.C. § 6903(3). Rather, it is only after the facility completes incineration that it engages in the “deposit,” “dumping,” “or placing of any solid waste or hazardous waste into or on any land”, *id.*, by “disposing of” the ash residue. 42 U.S.C. § 6921(i). Such disposal, however, is plainly encompassed within § 3001(i)’s exemption. Simply stated, this is because if Congress’s use of the language—“a resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be . . . disposing of . . . hazardous waste”—is to have any meaning, it must refer to the facility’s subsequent “dispos[al] of” MSW ash. As EPA recently noted in its September 1992 MWC Ash Memorandum, “the burning of such waste generally is regarded as a type of treatment under RCRA. . . . MWC ash ordinarily is the only waste “disposed of” by such a facility.” MWC Ash Memorandum at 3 (internal citations omitted).

As the foregoing demonstrates, the entire process is one of *managing* the MSW stream, in other words, “[t]he systematic control of the collection, source separation . . . transportation . . . treatment, recovery, and disposal” of the waste. 42 U.S.C. § 6903(7) (emphasis added). By expressly including in § 3001(i) the terms “treating,” “disposing of” and “managing,” Congress manifested its intent to exempt the entire continuum of MSW management from regulation under RCRA’s Subtitle C hazardous waste regime.

In reaching its conclusion that MSW ash does not fall within the scope of the exclusion, the court of appeals reasoned that the terms used in § 3001(i), *i.e.*, “otherwise managing,” “treating,” and “disposing of,” are not “coextensive” with the term “generating” and that their “definitions exclude ‘generation.’” Pet. App. 18-19.

In doing so, however, the court of appeals effectively read the former terms out of the statute. Contrary to the reasoning of the court of appeals, the term “treatment” expressly encompasses the changes in physical and chemical composition and character which occur during the creation of ash residue by incineration. *See* 42 U.S.C. § 6903(34). And RCRA’s definition of “treatment” includes processes which do not render waste “nonhazardous” so long as they “render such waste . . . safer for transport, amenable for recovery, amenable for storage, or reduced in volume.” *Id.*

Likewise, the term “management” embraces such activities as the “processing, treatment, and disposal” of wastes, *see* 42 U.S.C. § 6903(7) (defining “hazardous waste management”) which, too, embraces the incineration of MSW and subsequent disposal of ash residue. *See also* 42 U.S.C. § 6903(3) (defining “disposal” as the “deposit . . . dumping . . . or placing of any solid waste or hazardous waste into or on any land . . .”).

As the foregoing demonstrates, the statutory definitions of the terms Congress employed in enacting § 3001(i)’s exemption clearly embrace the entire MSW stream from its generation by households through the post-incineration disposal of ash residue. The court of appeals’ failure to give operative effect to the very language which Congress employed in § 3001(i) and RCRA’s statutory definitions thus violates the fundamental canon of statutory construction that each word in a statute be given effect. *See, e.g., United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992); *Crandon*, 494 U.S. at 171. This, by itself, is reason to reverse the judgment of the court below.

#### **B. The History Of § 3001(i) Demonstrates That Congress Intended To Exempt The Entire MSW Stream From Regulation Under Subtitle C**

The history of § 3001(i) supports our reading of the plain language. Consistent with congressional resource recovery policies and the MSW regulatory scheme em-

bodied in RCRA, in 1980 EPA promulgated the Household Waste Exclusion Rule which provided the basis for the statute which Congress adopted four years later as Section 3001(i). See 45 Fed. Reg. 33,084, 33,120 (1980) (codified at 40 C.F.R. § 261.4(b)(1) (1992) as amended). EPA's rule excluded the entire household waste stream from Subtitle C regulation. Although EPA knew when it promulgated the regulation that a small amount of hazardous waste would be included in the MSW waste stream, the agency nonetheless concluded that Congress's intent was best served by excluding the entire waste stream from Subtitle C regulation:

The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded *in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment)* are not subject to regulation as hazardous waste.

45 Fed. Reg. 33,099 (1990) (emphasis added). Hence, as a category of waste, household waste, including ash residue remaining after treatment, was explicitly excluded from regulation as a hazardous waste. The rationale for this exclusion was not based on the *content* of the MSW waste stream, but rather on the express congressional policy of excluding *the entire* waste stream—"in all phases of its management"—from the hazardous waste regulations regardless of whether it could be classified as hazardous waste on account of the characteristics of its constituents. See *id.* at 33,097.<sup>35</sup>

<sup>35</sup> Discussing the hazardous waste regulatory scheme in the preamble to the regulation, EPA acknowledged that the system was imperfect:

This system may not work perfectly for every waste however. It may overregulate in some instances and underregulate in others. This is an unavoidable consequence of attempting to

When Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. (98 Stat.) 3221 (codified at various parts of RCRA) (hereinafter "1984 RCRA Amendments"), it expressly ratified EPA's interpretation of legislative intent with respect to MSW by enacting the "Clarification of Household Waste Exclusion" as Section 3001(i).<sup>36</sup> Section 3001(i) thus codified the household waste exclusion rule promulgated by EPA. Congress also clarified that the exclusion removed the entire household waste stream from the Subtitle C hazardous waste regime and that it applied to resource recovery facilities which burned and derived energy from MSW.

The intent behind the clarification is stated in S. Rep. No. 284, 98th Cong., 1st Sess. (1983), the Senate report accompanying the Senate amendments to the original House bill, and agreed to by the Conference Committee.<sup>37</sup> Recognizing that it was important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation, Senate Report 284 indicated that new Section 3001(i) clarified Congress' original purpose to include within the household waste exclusion *all* the waste management activities of a resource recovery facility which recovered energy from the mass burning of household

develop a national hazardous waste management program which has to regulate thousands of wastes.

*Id.* at 33,088-89 (emphasis added). Despite this imperfection, EPA, in accordance with the policy choice made by Congress, struck the balance in favor of underregulation in order to promote the important public policy of providing local governments with flexibility in handling their MSW and encouraging resource recovery.

<sup>36</sup> See 1984 RCRA Amendments § 223, 1984 U.S.C.C.A.N. (98 Stat.) 3252 (codified as amended at 42 U.S.C. § 6921(i)).

<sup>37</sup> See H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5677.



waste and nonhazardous waste from other commercial sources, as long as the facility took precautions against accepting hazardous waste from commercial sources.

All waste management activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) are met.

S. Rep. No. 284 at 61 (emphasis added). Significantly, the Senate Report included "generation" in its explanation of the provision proposed as Section 3001(i), even though the language of that provision did not include the term. The Conference Committee adopted, without change, the Senate version of Section 3001(i).

The unambiguous statement by the Senate that all MSW waste management activities by a resource recovery facility are covered by the Section 3001(i) exemption confirms that "Congress clearly knew of the EPA's interpretation of the 1980 regulation" and agreed with it. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 765-66 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991). Moreover, the statement confirms that Congress expressly intended MSW ash—the treatment residue—to be within the scope of Section 3001(i)'s exemption.

### C. The Court Of Appeals' Interpretation Contravenes The Congressional Purpose Underlying Section 3001(i)

Even if the Court deems it necessary to look beyond the plain language and history of Section 3001(i), it must still reject the court of appeals' construction because it is demonstrably at odds with the object and policy of the statute. *Crandon*, 494 U.S. at 158.

As described below, Congress, in enacting RCRA and subsequent amendments thereafter, including § 3001(i),

has consistently sought to promote resource recovery as an option for managing MSW in order to save scarce landfill space and facilitate energy recovery. In promoting this goal, Congress intended that the management of the entire MSW waste stream—including the ash remaining after incineration of MSW—be kept separate and apart from RCRA's hazardous waste management regime. The court of appeals simply ignored Congress' "object and policy" in enacting the statute. *Crandon*, 494 U.S. at 158. Its holding thus undermines the congressional purpose in enacting RCRA and § 3001(i).

### 1. The Court of Appeals' Decision Contravenes the Congressional Purpose of Promoting the Development of Resource Recovery Facilities

In enacting RCRA, one of Congress' fundamental objectives was promoting resource recovery as an approach to managing MSW. Congress recognized the increasing scarcity of land available to metropolitan areas caused by landfilling of MSW and concluded that resource recovery facilities should be promoted both as an alternative to landfilling and as an independent source of energy. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. *See also* RCRA § 1002(b)(8) & (d), 42 U.S.C. § 6901(b)(8) & (d).<sup>38</sup>

Congress's purpose of promoting the incineration of MSW to produce energy as a primary means of resource

<sup>38</sup> Demonstrative of its purpose of promoting the development of MSW resource recovery, Congress authorized technical as well as research and development aid to localities developing resource recovery facilities under Subtitles B and D of RCRA. *See* RCRA §§ 2003 & 4008, 42 U.S.C. §§ 6913, 6948. Congress also authorized EPA to promulgate rules and guidelines to assist States in implementing resource recovery plans and to specifically consider appropriate types of resource recovery facilities for a variety of state and municipal situations. *See* RCRA § 4002(c)(10), 42 U.S.C. § 6942(c)(10).



recovery is amply reflected throughout the legislative history of RCRA. For example, the House Report explained that Section 4003 of RCRA, 42 U.S.C. § 6943, allowed state and local governments the flexibility needed to develop alternative disposal systems by "requir[ing] that the discarded materials be utilized by a resource recovery facility for the recovery of energy . . . or that such discarded materials be disposed of . . . by [an] environmentally sound method of disposal, *including incineration* that does not conflict with the Clean Air Act." H.R. Rep. No. 1491, at 78-79 (emphasis added).<sup>39</sup>

Four years after the passage of RCRA, Congress reaffirmed its objective of promoting the development of resource recovery facilities by enacting Section 32 of the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 1980 U.S.C.C.A.N. (94 Stat.) 2334 (codified at various parts of Subtitle D of RCRA). Section 32 amended RCRA to improve and augment federal programs for energy and resource recovery assistance to States and municipalities by authorizing the EPA to provide (1) grants to States and municipalities in order to facilitate waste-to-energy feasibility and developmental planning and, (2) technical assistance in order to remove impediments to the development of energy recovery.

As RCRA and its 1980 amendments demonstrate, the Congressional purpose underlying RCRA and § 3001(i) was to promote the recovery of energy by excluding from Subtitle C's regulatory scheme the MSW waste

<sup>39</sup> See also H.R. Rep. No. 1491, at 88-89, reprinted in 1976 U.S.C.C.A.N. 6324 (detailing the composition of the MSW stream, and comparing the energy yields from incineration of MSW and coal in terms of the British Thermal Unit value per pound each contain, as well as their respective ash content equivalents); 122 Cong. Rec. H11147, H11153 (Sept. 27, 1976) (statement of Rep. Myers) (RCRA represents a "major congressional commitment" to recapture the discarded "millions of tons of paper, valuable metals, glass, and other waste materials which could be reused or burned for their energy value.") (emphasis added).

stream in "all phases of its management," including treatment by incineration and disposal of the ash residue resulting from such treatment. The court of appeals' construction of § 3001(i) undermines this purpose, effectively rendering the statute a nullity by creating a great economic disincentive to the development and continued use of resource recovery facilities.

Even though incineration reduces the mass of MSW by approximately seventy-five percent, see *Solid Waste Management* at 117, the high cost of disposing of MSW ash in Subtitle C landfills—estimated by EPA at an average of \$453 per ton nationwide, MWC Ash Memorandum at 7—more than offsets the benefit of incineration. Indeed, the surcharge which the Seventh Circuit has imposed—more than \$410 per ton if the national average disposal costs for ash in Subtitle C (\$453) and D (\$42) landfills is used—will simply render existing and proposed facilities economically unviable. Even with the reduction in the waste mass gained by incineration, landfilling untreated waste will be far cheaper than the cost of incinerating the waste and disposing of it in a Subtitle C landfill. See *supra* p. 8 & n.26. Faced with this surcharge to the cost structure of resource recovery facilities, investments in such facilities will no longer be made. And the economic costs imposed by the court of appeals' holding will result in municipalities abandoning their use of resource recovery facilities in favor of the least-cost alternative of landfilling untreated waste—thus undermining Congress's purpose of promoting the use of such facilities.

#### **D. If The Language Of The Statute Is Ambiguous And The Legislative History Inconclusive, The Court Should Defer To EPA's Interpretation**

Finally, if the Court concludes that the language of Section 3001(i) is ambiguous and the legislative history is inconclusive, the Court should defer to the EPA's reasonable interpretation of the statute as set forth in the

1992 MWC Ash Memorandum. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As this Court noted in *Chevron*, when a

court determines [that] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843 (footnotes omitted); see also *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) ("agency's interpretation must be rational and consistent with the statute"). To be a permissible construction, "[t]he court need not conclude that the agency's construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

As Judge Ripple cogently explained in his dissent below, EPA's MWC Ash Memorandum was a responsible attempt to resolve a major environmental policy question in a situation where two courts of appeals had reached diametrically opposed decisions on a question of statutory interpretation. Pet. App. 3-4. EPA's interpretation is permissible as it is both rational and consistent with the statute: EPA's interpretation is based on giving operative effect to all the terms of § 3001(a) and comports with both Congress's intent and its underlying policy of promoting resource recovery.

In refusing to accord deference to the EPA's Ash Memorandum, the court of appeals reasoned that the agency had "waffl[ed]" in interpreting section 3001(i) and was

thus no longer entitled to deference. See Pet. App. at 16. The court of appeals' reasoning, however, is directly contrary to the teachings of this Court. As this Court noted in *Chevron*, "[a]n agency interpretation is not instantly carved in stone." 467 U.S. at 863. Particularly when an agency policy is predicated on certain scientific and technical judgments which may continue to evolve, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64; see also *Rust*, 111 S.Ct. at 1759 (An agency "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" (citations omitted)).

It is thus incorrect to portray the EPA as having "waffled." Granted, the preamble to EPA's 1985 amendment of the Household Waste Exclusion Rule displays the EPA's careful consideration of whether to regulate MSW ash as a hazardous waste.<sup>40</sup> Nonetheless, EPA continued to view § 3001(i) as exempting MSW ash from regulation as a hazardous waste under Subtitle C. See 50 Fed. Reg. 28,702, 28,726 (1985). And when, in 1992, EPA finally undertook a detailed analysis of Section 3001(i), it definitively resolved the issue by concluding that MSW ash is excluded from hazardous waste regulation. Significantly, EPA resolved the issue without departing from the view it took in the 1980 promulgation of the Household Waste Exclusion Rule and its other interim pro-

<sup>40</sup> Notwithstanding this language, EPA continued to take the position in its regulatory and enforcement actions that MSW ash remained excluded from hazardous waste regulation under Section 3001(i). As EPA stated in the 1985 preamble:

EPA does not believe the HWSA imposes new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities.

50 Fed. Reg. 28,702, 28,726 (1985).

nouncements that MSW ash residue was exempt from regulation under Subtitle C.<sup>41</sup>

Moreover, even if EPA has changed its interpretation of Section 3001(i), that does not compel the conclusion that the agency's most recent view is not to be afforded deference. As *Chevron* instructs, an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863-64; *see also Rust*, 111 S.Ct. at 1769. Just as in *Chevron*, where the Court deferred to EPA (recognizing that the agency had reconsidered its policy in light of changing circumstances, *see* 467 U.S. at 857-58), in this case EPA has reconsidered the technical and policy issues posed by MSW ash in light of new developments. Here, EPA's conclusion that MSW ash "can be regulated in a manner that will be protective of human health and the environment under Subtitle D," MWC Ash Memorandum at 5-6, is based on the agency's assessment that the promulgation of stricter criteria for MSW landfills receiving MSW ash will adequately safeguard the environment. *See* 40 C.F.R. pt. 258 (1992), 56 Fed. Reg. 50,978 (1991); MWC Ash Memorandum at 5 & n.5.<sup>42</sup> Thus, far from being instances of "waffling," EPA's current and former pronouncements fall well within the "ample latitude" given the agency to "adapt its rules to the demands of changing circumstances," and to consider on a continuing basis "varying interpretations" of the statute and the "wisdom of its policy." *Rust*,

<sup>41</sup> In addition to EPA's conclusion in the preamble to the 1985 amendment of the Household Waste Exclusion Rule, EPA also concluded in 1991, when it adopted the more stringent solid waste landfill criteria, that until Congress speaks to the issue EPA will continue to regulate MSW ash under Subtitle D. *See* 56 Fed. Reg. 51,040 (1991).

<sup>42</sup> As previously noted, these regulations impose stringent requirements for the construction and maintenance of MSW landfills, including requirements expressly designed to prevent the leaching of metals. *See* n.15, *supra*.

111 S.Ct. at 1769. As the agency having expertise over the subject matter of the statute, EPA's view was entitled to deference.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,  
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,  
Respondents.

On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CITY OF SPOKANE, WASHINGTON;  
SPOKANE COUNTY, WASHINGTON; SKAGIT COUNTY,  
WASHINGTON; CITY OF TACOMA, WASHINGTON; MARION  
COUNTY, OREGON; RECOMP OF WASHINGTON; AND  
REGIONAL DISPOSAL COMPANY AS *AMICI CURIAE*  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-1639

THE CITY OF CHICAGO, et al.,  
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,  
Respondents.

On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CITY OF SPOKANE, WASHINGTON;  
SPOKANE COUNTY, WASHINGTON; SKAGIT COUNTY,  
WASHINGTON; CITY OF TACOMA, WASHINGTON;  
MARION COUNTY, OREGON; RECOMP OF WASHINGTON;  
AND REGIONAL DISPOSAL COMPANY AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

*Amici* are local governments and private companies in the Pacific Northwest that share an interest in protecting public health through cost-effective waste management. *Amici* urge the Court to reverse the judgment of the court of appeals and to hold that 42 U.S.C. § 6921(i), which excludes resource recovery facilities burning municipal solid waste



from hazardous waste regulation, encompasses the ash residues of that waste.<sup>1</sup>

As *amici* know from their own experience, local governments face major challenges in seeking to dispose of municipal trash. Resource recovery is a key weapon in the war on waste.

*Amici* City and County of Spokane adopted resource recovery in the 1980s to address shrinking landfill capacity and threats to the drinking water supply caused by pollution from existing landfills. *Amici* Skagit County, Marion County, and Tacoma, like Spokane, chose recycling and resource recovery as cost-effective waste disposal measures in the best interests of their local communities. Whatcom County, Washington, elected to use the private incineration and ash landfill facilities of *amicus* Recomp of Washington. *Amicus* Regional Disposal owns and operates a state-of-the-art ash monofill in Klickitat County, Washington. This monofill, constructed to the exacting standards of the Washington Incinerator Ash Residue Act, Wash. Rev. Code ch. 70.138 (1992), serves Spokane and could become an ash disposal site for other resource recovery facilities in the Pacific Northwest.

### STATEMENT

The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 - 6992k, establishes a comprehensive national framework for waste management. RCRA sets forth minimum federal requirements to be implemented at the state and local level. State and local

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<sup>1</sup> The parties' letters of consent have been filed with the Clerk, pursuant to Rule 37.3 of the Rules of this Court.

governments may supplement RCRA's minimum requirements with more stringent standards.

At the heart of RCRA is a distinction between wastes that are regarded as "hazardous" and wastes that are not. *See* 42 U.S.C. § 6921. "Hazardous" wastes are a small subset of "solid" wastes. Hazardous wastes are subject to stringent standards under Subtitle C of RCRA, 42 U.S.C. §§ 6921 - 6939b. Subtitle C standards detail all phases of hazardous waste management, from the type-size on 55-gallon drum labels to the design standards for large regional landfills. Solid wastes are subject to an equally comprehensive but less stringent set of minimum standards under Subtitle D of RCRA, 42 U.S.C. §§ 6941 - 6949a.

Congress's decision to regulate hazardous wastes and solid wastes separately rests on the sound judgment that hazardous wastes pose the greatest risk to public health and should be regulated more stringently than other wastes. At the same time, Congress recognized that applying Subtitle C standards too broadly could discourage beneficial activities; moreover, effective implementation of Subtitle C requires focusing on those that generate the largest amounts of hazardous waste. Congress therefore authorized exclusions to its definition of hazardous waste. The Environmental Protection Agency ("EPA") was given the authority to identify and to regulate the wastes subject to Subtitle C. *See* 42 U.S.C. §§ 6921 - 6924. The states were given primary responsibility for regulating the remaining waste stream.

In 1980 the EPA issued regulations identifying certain solid wastes as hazardous. *See* 45 Fed. Reg. 33,119 (May 19, 1980). The EPA *excluded* from Subtitle C regulation certain other solid wastes that might otherwise be regarded as hazardous. *See id.* at 33,096 - 97. Among these were "household wastes." *See id.* at 33,120, *codified as* 40 C.F.R.

§ 261.4(b)(1) (1992). Four years later, as part of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (the "1984 Amendments"), Congress added to RCRA a new Section 3001(i), entitled "Clarification of household waste exclusion." The current dispute addresses the scope and meaning of Section 3001(i).

Section 3001(i) provides:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if--

(1) such facility--

(A) receives and burns only--

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).

The EPA has never regulated ash from municipal resource recovery facilities as a hazardous waste. The EPA's "household waste" exclusion expressly encompassed the ash residues remaining after incineration. 45 Fed. Reg. 33,099 (May 19, 1980). In 1985 the EPA stated that, while it did not understand Section 3001(i) to cover ash residues that routinely displayed a hazardous characteristic, it had no reason to believe that such residues were hazardous under existing rules, and it did not plan to subject resource recovery facilities to additional regulatory burdens. 50 Fed. Reg. 28,725-26 (July 15, 1985). Congress expressly forbade the EPA from regulating ash from incineration units burning municipal waste for a period of two years after enactment of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2584 (1990). Finally, the EPA determined last September that it was unnecessary and inappropriate to regulate ash under Subtitle C. Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under RCRA Section 3001(i) (Memorandum of William K. Reilly, Administrator of the EPA, to all regional administrators dated Sept. 18, 1992) ("EPA's 1992 Memorandum").

In the meantime, however, litigation arose challenging the application of Section 3001(i) to ash residues. The plaintiffs in two cases established that incinerator ash frequently fails laboratory tests of toxicity. See



*Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 761 n.6 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S.Ct. 453 (1991) (nine out of ten samples of ash from the Westchester Resource Recovery Facility failed EP toxicity test); *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345, 346 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303, *cert. granted*, 61 U.S.L.W. 3845 (1993) (32 out of 35 samples of ash from the Northwest Waste-to-Energy Facility exceeded the standard for Extraction Procedure toxicity).

The United States Court of Appeals for the Second Circuit concluded that incinerator ash was excluded from regulation as a hazardous waste under Section 3001(i). *Wheelabrator*, 931 F.2d at 213. The Seventh Circuit, over the dissent of Judge Ripple, held that it was not. *Chicago*, 948 F.2d at 352. This Court granted certiorari, vacated the decision, and remanded for reconsideration in light of the EPA's 1992 Memorandum. 113 S. Ct. 486 (1992). On remand, the court of appeals affirmed its previous decision, with Judge Ripple again dissenting. 985 F.2d 303 (7th Cir. 1993). This Court granted the City's petition for certiorari.

### SUMMARY OF ARGUMENT

Section 3001(i) does not directly address incinerator ash. The courts have divided on whether "treating," "disposing of," and "otherwise managing" hazardous wastes encompass disposal of treatment residues (ash), or whether those residues should rather be considered to be "generated" in the process of incineration. Where, as here, congressional silence has left a gap in the statute, courts should defer to the reasonable interpretation of the agency charged with enforcing the law. Both the context in which Congress acted and the goals it sought to achieve strongly favor placing ash

within the statutory exclusion. The interpretation set forth in the EPA's 1992 Memorandum is plainly permissible.

Deference to the EPA's interpretation is especially appropriate in light of the complexity of RCRA and the many policies that underlie it. The Seventh Circuit ignored these considerations and, instead, focused on the alleged hazards of ash. The court's factual assumptions are simply wrong: in a landfill environment, ash is safer than untreated municipal solid waste. The EPA's policy analysis supports excluding incinerator ash from Subtitle C regulation.

The EPA's position is well-considered and consistent with both its initial understanding of the household waste exclusion and regulatory practice over the past 13 years. Disregarding that history and adopting the Seventh Circuit's approach would upset the long-term plans and contracts of local governments that accepted Congress's invitation to invest in resource recovery facilities. Such a draconian result is neither necessary nor appropriate.

### ARGUMENT

#### A. The Court of Appeals Erred in Refusing to Defer to the EPA's Interpretation.

As the court of appeals acknowledged, each party to this litigation argues that the plain language of Section 3001(i) supports its position. 948 F.2d at 348. The court described Section 3001(i) as "a statute subject to varying interpretations." *Id.* at 350. Nevertheless, the court declined to rely on the interpretation advanced by the EPA, the agency charged with enforcing RCRA, because it regarded that interpretation as "waffling" and "see-sawing." *Id.* The court also declined to rely on legislative history. Thus cast back on the language of the statute, the court sought to divine



Congress's intent from the words Congress used. After examining several statutory definitions, the court concluded that keeping ash outside the scope of Section 3001(i) was consistent with policy judgments that it assumed underlay RCRA. *See id.* at 352.

*Amici* will show that the court of appeals' policy analysis rests on factual assumptions that are demonstrably false. Unlike administrative agencies, courts are singularly ill-equipped to make such judgments. In its decision following this Court's remand, however, the court of appeals refused to credit the EPA's 1992 Memorandum. Asserting that "the language of Section 3001(i) is clear," 985 F.2d at 304, the court ruled that the Administrator's policy arguments can only be advanced to Congress. In so ruling, the court not only disregarded this Court's mandate to follow *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), but also gave unwitting testimony to the soundness of *Chevron's* precepts.

**1. The statute is silent with respect to the specific issue of ash residues.**

In reviewing an agency's construction of the statute that it administers, a court first asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "the unambiguously expressed intent of Congress" must be given effect. *Id.* at 843. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Section 3001(i) does not directly address the status of incinerator ash. The parties here and two courts of appeal dispute the inferences that should be drawn from this silence, as well as the scope and meaning of the terms used in the

statute. In such a case, *Chevron* demands deference to the agency's reasonable construction.

Section 3001(i) must be examined in context. Congress enacted its "Clarification of household waste exclusion" in 1984 mindful of the scope of that exclusion. Without question, the EPA's then-current regulatory exclusion encompassed incinerator ash. The EPA observed in its 1980 preamble to the regulation creating the exclusion that Congress, in passing RCRA, intended to exclude *the entire household waste stream* from regulation under Subtitle C. In the EPA's view, this waste stream included ash residue produced in the incineration of household waste:

Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste.

45 Fed. Reg. 33,099 (May 19, 1980).

Had Congress meant to change this aspect of the regulatory exclusion, it would have said so. After all, the 1984 Amendments did clearly extend the exclusion from household wastes to municipal wastes generally, including non-hazardous commercial and industrial wastes, subject to adoption of procedures to guard against receipt or burning of hazardous materials. Yet "[n]owhere in the 1984 exclusion, nor in the Committee report that accompanied it, is there any hint of a congressional intent to limit the scope of that earlier exclusion." *Wheelabrator*, 725 F. Supp. at 765. What this Court noted in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), is equally true here: "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by

Congress." *Id.* at 983 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

It cannot be credibly argued that ash remains excluded from Subtitle C regulation pursuant to the EPA's 1980 exclusion so long as it results from the incineration of household wastes, but not if it is the product of burning other municipal wastes. *See Wheelabrator*, 725 F. Supp. at 765. Such an interpretation would make a hash of the 1984 Amendments. Moreover, it would run counter to the express will of Congress to extend the scope of the exclusion beyond household waste. *See id.* The most that can be said in favor of respondents' position is that congressional silence regarding ash left a gap for the EPA to fill.

According to the court of appeals, the absence of the term "generating" in a list of hazardous waste-related activities in Section 3001(i) is critical: it limits the scope of the exclusion. *See* 948 F.2d at 351.<sup>2</sup> Congress may well have determined, however, that the terms it used were sufficient, if not better suited, to carry forward the existing exclusion of incinerator ash.

<sup>2</sup> The Report of the Senate Committee on Environment and Public Works that accompanied Section 3001(i) states:

All waste management activities of [a resource recovery] facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations . . . are met.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). There is no indication that Congress meant to narrow the waste management activities covered by the statutory exclusion. *See Wheelabrator*, 725 F. Supp. at 764-65.

The specific terms used in Section 3001(i)--"treating," "storing," "disposing of"--all appear in the original household waste exclusion:

The following solid wastes are not hazardous wastes:

- (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused.

45 Fed. Reg. 33,120 (May 19, 1980), *codified as* 40 C.F.R. § 261.4(b)(1) (1992). If the EPA did not see any need to use the term "generation" for ash to be included in the scope of its regulatory exclusion, it is doubtful that Congress would have thought the term necessary for its statutory clarification to have the same effect.

Nor should Congress have anticipated such an interpretation. Section 3001(i) provides that a qualifying resource recovery facility shall not be deemed to be "treating, storing, disposing of or otherwise managing hazardous wastes for the purposes of regulation under [Subtitle C]." "Treatment" includes any process designed to change the physical, chemical, or biological character of hazardous waste so as to reduce its volume. 42 U.S.C. § 6903(34). Incineration is such a process.<sup>3</sup>

<sup>3</sup> The court of appeals noted that ash "is fundamentally different in its chemical and physical composition from the . . . rubbish that goes in." 948 F.2d at 351. The court of appeals, however, drew the wrong inference from this observation: that ash was a "whole new substance," subject to a different form of regulation.

As Congress knew in 1984, the regulatory exclusion defined ash as the "residues remaining after treatment." See 45 Fed. Reg. 33,099 (May 19, 1980). Section 3001(i)'s specification of "treatment" reasonably includes "treatment residues." Congress also expressly addressed disposal, and ash is what a resource recovery center must dispose of. Like the EPA before it, Congress was excluding an entire waste stream, from collection to treatment to disposal of the treatment residue, from regulation under Subtitle C.<sup>4</sup> The notion that a "new" waste would be "generated" in the middle of this process, requiring a separate exclusion for "generation," is foreign to Congress's approach.

Section 3001(i) also speaks broadly of "otherwise managing" hazardous waste. The statute does not define "otherwise managing." The court of appeals decided, however, that "otherwise managing" should be interpreted as congruent with "hazardous waste management," which as defined in 42 U.S.C. § 6903(7) does not include "generation." The court ignored the fact that Subtitle C is captioned "HAZARDOUS WASTE MANAGEMENT" and includes standards for the generation of waste. 42 U.S.C. § 6922. That Congress would focus on the niceties of definitional

<sup>4</sup> The Senate Report observes:

Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous waste streams from a variety of sources other than "households." New section 3001(i) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

language rather than statutory headings, and use fine gaps in the former to mark a significant departure in regulatory policy, is highly doubtful.

The other provisions of Section 3001(i) are also inconsistent with the court of appeals' interpretation. The exclusion for resource recovery facilities contained in Section 3001(i) is conditioned on adequate assurances that the facility will not accept hazardous wastes. See 42 U.S.C. § 6921(i)(2). Such requirements are obviously intended to improve the quality of the treatment residue, i.e., the ash. If ash were not the focus of this exclusion, one would expect to find similarly qualified exclusions for other solid waste facilities (e.g., landfills). There are no such qualifications elsewhere in the statute.

Beyond inconsistency, the court of appeals' interpretation leads to absurdity. Under the court's reading, Section 3001(i) provides only that a facility that does not accept hazardous wastes will not be deemed to be handling such wastes. This is wholly redundant. As the district court observed in *Wheelabrator*, under this construction "it is difficult to understand what, if any, benefit the [f]acility derives from the exemption." 725 F. Supp. at 763 n.12.

Statutes should be construed in context. They should be construed to avoid absurdity. The court of appeals' interpretation of Section 3001(i) violates both canons of construction. The most that can be said for respondents' arguments is that Congress left a gap in the statute. Refusing to credit the EPA's reasonable interpretation in these circumstances is error.



**2. The EPA's interpretation comports with the policies underlying RCRA.**

Deference to administrative agencies is especially appropriate in an area that is complex and highly technical and involves significant policy issues. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991). As this Court has explained:

Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. As *Chevron* itself illustrated, the resolution of ambiguity in a statutory text is more often a question of policy than of law.

*Id.* at 2534. The court of appeals in this case, however, esteemed its own policy judgments superior to those of the EPA.

According to the court of appeals, to include incinerator ash within Section 3001(i) would be an "absurd" reading of the statute:

It is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills.

948 F.2d at 352. Just as alarmist rhetoric is no substitute for analysis, so the court's assertions regarding likely congressional intent do not withstand scrutiny.

Ash tests positive for toxics for the simple reason that incineration, by reducing the volume of municipal waste, concentrates the heavy metals that are already in that waste. These metals are *more* likely to seep into the ground and water table if untreated solid waste (in much more "massive" quantities) is placed in ordinary landfills. As combustion liberates energy from the waste, moreover, it destroys bacteria, viruses, and volatile organic compounds. Consequently, ash is easier to handle and safer in a landfill environment than the municipal solid waste ("MSW") that it replaces.

Research supports these conclusions. Samples of MSW combustion ash have been tested according to the Extraction Procedure and the Toxicity Characteristic Leaching Procedure ("TCLP"). These procedures simulate landfill conditions by passing liquids through a waste sample and measuring the constituents that leach into the liquid.<sup>5</sup> In the laboratory, ash may be "hazardous" due to levels of heavy metals, typically lead and cadmium, in the extraction liquids. See H. Sale, *Trash, Ash, and Interpretation of RCRA*, 17 Harv. Env. L. Rev. 409, 421 (1993); R. Goodwin, *Defending the Character of Ash*, 6 Solid Waste and Power 18, 18 (1992).<sup>6</sup>

<sup>5</sup> The Extraction Procedure, referred to by the court of appeals (948 F.2d at 346), is the TCLP test's predecessor. The TCLP uses one of two leaching fluids, depending on the results of a pre-test of the ash. Alyce M. Ujihara and Michael Gough, *Managing Ash from Municipal Waste Incinerators* 20 (1989); 40 C.F.R. Pt. 261 App. II (1992).

<sup>6</sup> Respondents have argued that improved waste screening and more recycling might enable resource recovery facilities to ensure that their ash passes the TCLP. Respondent's Brief in Support of Certiorari, at 11 n.7 (June 1, 1993). By its terms, however, Section 3001(i) already conditions the exemption on use of contractual restrictions and inspection procedures to screen out materials that would impair ash quality. In suggesting further

Unless one knows how untreated MSW would fare under the same test, one cannot say anything about the relative hazards of ash. In the real world, studies show, leachate from landfills containing only ash is consistently less contaminated than leachate from landfills containing unburned household wastes. See 1 NUS Corporation, *Characterization of Municipal Waste Combustion Ashes and Leachates from MSW Landfills, Monofills and Co-Disposal Sites* ES-10 (1987) (EPA/530-SW-87-028A). The incineration process diminishes household wastes' toxicity by destroying the volatile organics that can otherwise leach from the wastes. *Id.* at 2-19.

Moreover, ash tends to solidify in landfills, rendering immobile the heavy metal constituents that often cause it to be categorized as "hazardous" in laboratory tests. Goodwin at 20. Air pollution control equipment in resource recovery facilities typically sprays lime reagents into combustion exhaust to reduce acid gasses. These lime reagents mix with the combustion ash and induce it to "set up into a pozzolanic (concrete-like) product." *Id.* at 18. See Sale at 424. Consequently, the laboratory simulation data relied upon by the court of appeals predict "much higher leaching of heavy metals than actually occur[s]." Goodwin at 20. See Sale at 423. So stable is the ash residue from resource recovery facilities that the concentration of metals in its leachate is below EPA's maximum allowances for drinking water. Goodwin at 20, Table 2. Over time, moreover, many of the metals pass below the threshold of detectability. See *id.* at 20-22 and Table 3. Because unburned waste undergoes no such stabilization, the heavy metals found in untreated MSW,

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screening requirements, respondents demonstrate the inconsistency between their interpretation and congressional intent.

though less concentrated, are more likely to leach into the environment.

Not only is the court of appeals' analysis of relative safety critically ill-informed; in addition, the court fails to address a number of policies other than safety that Congress carefully balanced in the 1984 Amendments and in RCRA. Review of these policies shows that exclusion of ash from Subtitle C advances the same policy goals as exclusion of unburned municipal wastes, and others as well.

Supporting the exclusion of municipal trash from Subtitle C are a number of RCRA policy considerations: the regulations available under Subtitle D;<sup>7</sup> the cost of complying with Subtitle C;<sup>8</sup> and the large volume of waste involved, which would overwhelm EPA's Subtitle C program.<sup>9</sup> The same factors support excluding ash. Ash is subject to RCRA Subtitle D regulation. See 56 Fed. Reg. 51,040 (Oct. 9, 1991); EPA's 1992 Memorandum, at 5.<sup>10</sup> The cost of

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<sup>7</sup> See 45 Fed. Reg. 33,099 (May 19, 1980) (noting that exempted household waste stream would be subject to Subtitle D).

<sup>8</sup> The EPA found that, on a national basis, there is over a tenfold difference between the per-ton cost of disposing of materials in Subtitle C facilities than in a Subtitle D landfill. EPA's 1992 Memorandum, at 7.

<sup>9</sup> Cf. 45 Fed. Reg. 33,104 (May 19, 1980) (exempting from Subtitle C hazardous wastes produced in small monthly quantities, because including such wastes would overrun the Subtitle C program).

<sup>10</sup> Effective October 9, 1993, EPA's Subtitle D program requires as a nationwide minimum that landfills be lined, their leachate collected, and both systems double-checked through ground water monitoring. See 40 C.F.R. Pt. 258 (1992). Even if leaching of ash occurs, therefore, the leachate will not enter the ground water so long as the liner and collection system are functioning.

disposing of ash at Subtitle C facilities could be "enormous." *Id.* at 7. Given the relative safety of ash residues, filling Subtitle C facilities with massive quantities of ash would be a gross misuse of resources.<sup>11</sup>

Excluding ash from hazardous waste regulation also furthers Congress's policy of encouraging resource recovery. See 42 U.S.C. § 6902(a) ("The objectives of this chapter are to . . . conserve valuable material and energy resources").<sup>12</sup> See also 42 U.S.C. § 6902(a)(1) (federal assistance for planning resource recovery); § 6942(c)(10) and (11) (state plans must consider resource recovery facilities and markets

<sup>11</sup> As one commentator states:

At the end of 1987, EPA estimated that the entire U.S. hazardous waste capacity was 34 million tons. Yet, waste combustion facilities in the U.S. generate from 7 to 9 million tons of ash per year. New hazardous waste disposal space is politically difficult to site and expensive to build.

H. Sale, 17 Harv. Env. L. Rev. at 432 (footnotes omitted).

<sup>12</sup> The Congress finds with respect to energy, that--

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation;

(3) technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(d).

for energy recovery); § 6943(c) (federal assistance for studying feasibility of resource recovery systems).

Finally, excluding ash from Subtitle C promotes reduction of solid waste volume, since resource recovery reduces the bulk of the material that must be placed in a landfill. 42 U.S.C. § 6941a(3). See 42 U.S.C. § 6901(b)(8) (calling for alternative land disposal practices to conserve solid waste disposal site capacity); 42 U.S.C. § 6903(34) ("treatment" includes volume reduction).

In short, the rationale that the court of appeals imputed to Congress--distinguishing between "hazardous" ash and "safe" household waste--collapses in the light of real-world experience. Ash poses *less* risk to the environment than other forms of the household waste stream that are excluded from regulation under Subtitle C. Ash is the necessary concomitant of energy recovery and volume reduction, two policies that RCRA expressly encourages. What this Court observed in a case last term is equally true here:

We should be especially reluctant to reject the agency's current view, which . . . so closely fits "the design of the statute as a whole and . . . its object and policy."

*Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). The Court should defer to the EPA's interpretation of Section 3001(i) as excluding ash residues from Subtitle C.



**B. The Court of Appeals' Criticism of the EPA is Misplaced.**

According to the court of appeals, "the EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers." 985 F.2d at 304. The court mistakes agency caution for vacillation. Review of the history of the EPA's policy regarding ash management and its interpretation of Section 3001(i) confirms that deference to the EPA's views is fully appropriate.

**1. The agency has not changed its regulatory approach.**

The starting point for considering the EPA's position on this issue is its 1980 regulatory exclusion for household wastes. The EPA understood that Congress, in enacting RCRA, expected the entire household waste stream would be excluded from Subtitle C regulation. *See* S. Rep. No. 94-488, 94th Cong., 2d Sess. 16 (1976). In giving effect to this expectation, the EPA stated that incinerator ash was part of the excluded waste stream. *See* 45 Fed. Reg. 33,099 (May 19, 1980).

Like many others, the EPA was perplexed by the "clarification" of the exclusion that Congress enacted in the 1984 Amendments. In its preamble to a regulation that mirrored the language of section 3001(i), the EPA noted that the statute was silent as to the status of residues from burning combined household and non-household, non-hazardous waste. EPA said it did not see in the statute an intent to exempt ash that routinely exhibited a characteristic of hazardous waste. EPA also said, however, that it did not know whether this would be an issue:

EPA has no evidence to indicate that these ash residues are hazardous under existing rules. . . . Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed. Reg. 28, 725-26 (July 15, 1985).

By 1987 the EPA was openly expressing doubt about its reading of congressional intent. Testifying before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works, the EPA official responsible for implementing RCRA stated:

The Agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.

It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household

exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent . . . .

December 3, 1987, testimony of J. Winston Porter at 16-17.

By 1989 the EPA had resolved the safety concerns that supported early caution. Testifying in support of a bill that would have resolved the ambiguity in Section 3001(i) by explicitly authorizing regulation of incinerator ash under Subtitle D rather than Subtitle C, EPA's Director of the Office of Solid Waste concluded that "a special waste program under Subtitle D, tailored to ash, could be consistent, practical, and environmentally safe." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 44 (May 11, 1989) (testimony of Sylvia Lowrance). See also *id.* at 33.<sup>13</sup>

The EPA's 1992 Memorandum, which officially superseded its 1985 document regarding Section 3001(i), is consistent with both the views expressed by Mr. Porter five years earlier regarding congressional intent and Ms. Lowrance's 1989 judgment concerning safety. Following a detailed analysis of the statute and its legislative history, the EPA observed that "the two statutory goals embodied in section 3001(i)--protecting the environment and promoting resource recovery from non hazardous solid waste--are best

<sup>13</sup> Neither the introduction of subsequent legislation nor its fate is relevant to the interpretation of congressional intent in 1984. See *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

served by exempting MWC [municipal waste combustion] ash from hazardous waste regulation." EPA's 1992 Memorandum at 5. With regard to the former, "EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D." *Id.* With respect to the latter, the EPA stated:

If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report [of encouraging commercially viable resource recovery facilities] could be substantially frustrated.

*Id.* at 4.

The EPA has consistently declined to extend Subtitle C regulation to the ash residues of municipal solid waste incineration. There is no warrant for this Court to do what the agency has deemed unnecessary and inappropriate.

## 2. The EPA's 1992 Memorandum reflects the agency's considered judgment.

Even if the court of appeals' characterization of the EPA position as "waffling" had merit, that would not justify disregarding the agency's current interpretation. As this Court observed in *Chevron*:

An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must

consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. In this case, as in *Chevron*, the agency has "considered the matter in a detailed and reasoned fashion." *Id.* at 865 (footnote omitted). Its interpretation, informed by experience and reflection, is eminently reasonable. Such an interpretation deserves respect.

The form in which this interpretation appeared--a policy memorandum--is no less deserving of deference than a formal regulation. See *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *EEOC v. Commercial Office Products*, 486 U.S. 107, 115 (1988). The EPA frequently relies upon memoranda to set forth its understanding of important regulatory issues. Moreover, the EPA was interpreting an existing regulation: its original household waste exclusion, supplemented by the language of Section 3001(i). See 40 C.F.R. § 261.4(b)(1) (1992).<sup>14</sup> Construing this exclusion to cover ash did not require a new regulation in 1992 any more than in 1980, when the EPA first promulgated the exclusion. Then and now, the exclusion covers a specific waste stream, including final disposal of treatment residues. See 45 Fed. Reg. 33,099 (May 19, 1980); EPA's 1992 Memorandum, at 2, 4.

<sup>14</sup> This Court has frequently held that an agency's interpretation of its own regulations should be given controlling weight unless that interpretation is plainly erroneous, inconsistent with the regulations, or violative of the Constitution or federal statute. *E.g.*, *Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993). The EPA's express understanding, both in 1980 and in 1992, that its household waste exclusion encompasses ash residues must be upheld under this standard.

**C. This Court Should Not Overturn State and Local Solid Waste Management Programs Implemented in Reliance on the Exclusion of Ash from Subtitle C Regulation.**

In interpreting Section 3001(i), the Court should consider the impact of its decision on the many public and private entities that have made long-term decisions under the statute and its precursor regulation over the past thirteen years. *Amici* urge the Court not to undercut actions that state and local governments have taken in the reasonable belief that ash from resource recovery facilities is excluded from regulation under Subtitle C.

RCRA envisions that local governments will assume front-line responsibility for solid waste planning and management. Congress mandated minimum federal standards for waste disposal facilities but encouraged cities and counties to select facilities best suited to the local climate, geology, economy and demography. To facilitate local control over solid waste management, Congress provided technical and financial assistance to local governments. 42 U.S.C. §§ 6901(a)(4), 6941.

Through RCRA, Congress expressly invited local governments to plan and implement resource recovery. 42 U.S.C. § 6941 ("The objectives of [Subtitle D] are to assist in developing and encouraging methods for the disposal of solid waste . . . which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste . . ."). See 42 U.S.C. §§ 6943, 6947(b) (ensuring that state solid waste plans supported local resource recovery efforts); 42 U.S.C. § 6902(a)(1) (federal assistance for planning resource recovery); 42 U.S.C. § 6942(c)(10) and (11) (state plans must consider resource recovery facilities and markets for energy recovery); 42



U.S.C. § 6943(c) (federal funds contingent upon states' support for municipalities' resource recovery efforts).

Local governments took up resource recovery as a solid waste management option not just because of congressional urging, but also because the traditional waste management method--placing unburned waste in landfills--had failed. "In 1986, 22 percent of the sites that were listed or proposed for listing on the National Priorities List under CERCLA were municipal solid waste landfills." Jeffrey M. Gaba and Donald W. Stever, *Law of Solid Waste, Pollution Prevention and Recycling* § 4.01 (1992).<sup>15</sup>

As local governments opted for resource recovery in reliance upon the exclusion set forth in Section 3001(i), several states promulgated special solid waste programs for incinerator ash.<sup>16</sup> These programs address the peculiar characteristics of ash; they do not coincide with all of the requirements of Subtitle C's "cradle-to-grave" hazardous waste management system. All such programs would be

<sup>15</sup> "CERCLA" or the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., is the federal statute requiring cleanup of sites where hazardous substances have been released to the environment. Sites are added to the National Priorities List under CERCLA only if the EPA finds that they present a significant risk to public health or the environment compared to other sites in the nation. See 42 U.S.C. § 9605(a)(8). These sites are commonly referred to as "Superfund sites." 49 Fed. Reg. 40,320 (Oct. 15, 1984).

<sup>16</sup> See, e.g., Mich. Comp. Laws §§ 299.432a - .432b (1991); Fla. Stat. Ann. § 403.7045 (West Supp. 1992); Fla. Admin. Code ch. 17-702 (1992); Code Me. R. ch. 403 (1990); Mass. Regs. Code title 310, §§ 19.119, .131 (1992); Conn. Agencies Regs. §§ 22a-209-1, -8, -14 (1990); N.Y. Comp. Codes R. Regs. title 6, §§ 360-2.14, -3.5 (1992); N.H. Code Admin. R. Dept. Env. Serv. Part Env. Wm 2602 (1992); 25 Pa. Code § 75.37 (1991).

rendered moot if the court of appeals' interpretation were upheld.

*Amici* City and County of Spokane illustrate the process by which local governments came to incorporate resource recovery into their municipal waste management strategies. For Spokane, resource recovery addressed not only a crisis of landfill capacity but also a crisis surrounding the community's drinking water. The citizens of Spokane draw their water from the Spokane Valley-Rathdrum Prairie Aquifer, which has been designated as the sole source of drinking water for over 500,000 people. 43 Fed. Reg. 5,566 (Feb. 9, 1978). This aquifer is a fragile resource, subject to pollution from landfills located above it.

These landfills have been a concern for many years. In 1979 the Spokane County Engineer's office issued its Water Quality Management Plan to Preserve the Quality of the Spokane-Rathdrum Aquifer under Section 208 of the Federal Water Pollution Control Act, 33 U.S.C. § 1288. Noting contamination, the Water Quality Management Plan recommended that resource recovery, recycling, and innovative disposal methods be considered as alternatives to landfills. In 1984 Spokane's Northside Landfill was placed on the National Priorities List ("NPL"). Spokane's landfills at Mica, Greenacres and Colbert were also added to the NPL. 51 Fed. Reg. 21,054 (June 10, 1986). The Mica, Greenacres and Colbert landfills are now closed, and all but a few acres of the Northside Landfill are closed as well.

In response to declining landfill capacity and threats to its drinking water supply, Spokane began a regional public planning process. The first step was to consider alternatives to solid waste landfills. In 1981 Spokane began analyzing resource recovery and recycling. Three years later it adopted the 1984 Spokane County Comprehensive Solid Waste

Management Plan Update ("1984 Plan"). The 1984 Plan includes specific elements for recycling, waste reduction and resource recovery; garbage landfills are only a last resort. The Washington Department of Ecology approved the 1984 Plan, and the Washington Supreme Court held that it was consistent with the Washington Solid Waste Management Act, Wash. Rev. Code ch. 70.95. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990).

To mitigate the effects of existing landfills as rapidly as possible, Spokane aggressively implemented the recycling and resource recovery elements of the 1984 Plan. Recycling programs increased the recycling rate in Spokane County from 5% in 1984 to 31% in 1992.<sup>17</sup> To manage the rest of the waste stream, Spokane issued an environmental impact statement and selected a site for a waste-to-energy facility ("WTE") in 1986. In 1987 Spokane signed a vendor contract to build and operate the WTE, a power sales contract for the electricity that the WTE generates, and a lease for the WTE site. In 1989 Spokane issued \$103 million in bonds and accepted a \$60 million grant from Ecology to design and build the WTE and recycling programs. In 1990 Spokane signed a long-term contract for ash disposal away from Spokane's aquifer at *amicus* Regional Disposal Company's new ash monofill in Klickitat County, Washington.

If the Court were to uphold the court of appeals' decision, subjecting ash residues to Subtitle C regulation, Spokane's costs would skyrocket. Whereas the total cost of transportation and off-site disposal for ash at a new Washington State monofill is \$35-40 per ton, the disposal

<sup>17</sup> Spokane's long-range goal is to recycle 50% by 1995, in accordance with the goal set by the Washington Legislature. Wash. Rev. Code § 70.95.010(9) (1992). See also Spokane County Comprehensive Solid Waste Management Plan Update, at 82 (January 1992).

fees alone for Subtitle C landfills in the Northwest are approximately \$240-270 per ton. In addition to raising disposal fees, Subtitle C would impose the costs of complying with hazardous waste generator and transporter requirements. See 40 C.F.R. Pts. 262, 263 (1992). The financial calamity that Subtitle C would visit on Spokane's resource recovery efforts illustrates the impact of a decision upholding the court of appeals on similar programs nationwide.

From the perspective of local governments and state regulators faced with the need to establish long-term programs during the 1980s, ash appeared to be excluded from Subtitle C regulation. In 1980 the EPA interpreted its original household waste exclusion to cover ash. Congress's subsequent enactment of the Section 3001(i) retained all relevant language from EPA's regulation and expanded its scope. The district courts that addressed the issue agreed that Section 3001(i) excluded ash from Subtitle C.<sup>18</sup>

Cities, counties, and the private companies that contract with them have established substantial long-term commitments formed around the EPA's original exclusion of the household waste stream from Subtitle C regulation. It is completely unnecessary to undo more than a decade of public planning and decision making. Were the court of appeals' decision to be affirmed, resource recovery would be profoundly damaged. This would be a tragic fate for a waste

<sup>18</sup> *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991); *Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303 (7th Cir.), *cert. granted*, 61 U.S.L.W. 3845 (1993).

management strategy that Congress has actively promoted and municipalities have adopted at great expense.

# CONCLUSION

The Court should reverse the decision of the court of appeals and hold, consistent with the EPA's interpretation of Section 3001(i), that ash residues from qualifying resource recovery facilities are excluded from regulation under Subtitle C.

Respectfully submitted,

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August 19, 1993



IN THE  
**Supreme Court of the United States**  
October Term, 1993

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CITY OF CHICAGO, *et al.*,  
*Petitioners,*

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AND ALLIED EDUCATIONAL FOUNDATION  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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Date: August 19, 1993

**QUESTION PRESENTED**

Whether, in interpreting Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), the Court of Appeals misapplied principles of statutory construction clearly enunciated by this Court, and thus impermissibly substituted its own subjective judgment for that of the Congress and the U.S. Environmental Protection Agency, viz., that no reasonable construction of Section 3001(i) could support the conclusion that ash produced at resource recovery facilities is exempt from hazardous waste regulation.

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No. 92-1639

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993

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CITY OF CHICAGO, *et al.*,  
*Petitioners,*

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On Writ of Certiorari to the  
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BRIEF OF WASHINGTON LEGAL FOUNDATION  
AND ALLIED EDUCATIONAL FOUNDATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center, based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF regularly appears before this Court and other federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government, especially in the area of environmental law. *See, e.g., Gade v. National Solid Wastes Management Ass'n*, 112 S.Ct. 2374 (1992); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2887 (1992); WLF's Legal Studies Division also publishes monographs and other publications on these topics.

The Allied Educational Foundation ("AEF") is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy, and has appeared with WLF as *amicus curiae* in numerous cases before this and other courts.

Both *amici* believe that courts should not substitute their value judgments for those of our elected leaders and government officials, and argue in this brief that the lower court in this case seriously violated fundamental principles of statutory interpretation. *Amici* bring a broader perspective to this case than the one presented by the parties, and believe that their brief will assist the Court in properly resolving this case. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

### STATEMENT OF THE CASE

This case is before the Court for the second time. In the first rendition to reach the Court, the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals") concluded, in a two-to-one decision, that the household waste exclusion in Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), did not apply to ash produced during the incineration of municipal solid waste. *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991) ("*EDF v. Chicago I*").<sup>1</sup> According to the Court of

<sup>1</sup> Section 3001(i) of RCRA reads as follows:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if --

(1) such facility --

(A) receives and burns only --

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential

(continued...)

Appeals, the law required the ash to be managed and disposed of under the most stringent requirements of RCRA, *i.e.*, Subtitle C. *Id.* at 352.

To reach this conclusion, the Court of Appeals referred to traditional rules of statutory construction but found "a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency." *Id.* at 350. The contemporaneous legislative history was found to be "foggy" by reason of post-enactment letters, issued years afterwards by six members of Congress who took issue with what the legislative history said. *Id.* at 347-49. The administrative agency's "waffling" was found in preambles to implementing regulations and testimony of government officials at Congressional hearings, all portrayed as far more equivocal than in fact they are. *Id.* at 348, 349-50.

Thus, having determined that it faced an ambiguous statute, "foggy" legislative history, and "waffling" agency interpretations, the Court of Appeals abandoned traditional rules of construction and gave no weight to the legislative history and no deference, slight or otherwise, to the Agency interpretation. *Id.* at 350-51. Instead, the Court of Appeals took a "holistic" or contextual approach to the issue and assigned a meaning to the provision that it

<sup>1</sup> (...continued)

sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).



concluded could be the only one Congress intended in light of the statute's overall purpose. *Id.* at 351-52.

This Court granted certiorari and vacated the Court of Appeals' judgment. *Environmental Defense Fund v. City of Chicago*, 113 S. Ct. 486 (1992). It remanded the case to the Court of Appeals for reconsideration in light of a post-judgment memorandum issued by the Administrator of the U.S. Environmental Protection Agency ("EPA"). See Memorandum from W. Reilly to Regional Administrators regarding "Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation under RCRA Section 3001(i)" (Sept. 18, 1992) (the "Reilly Memorandum"). In that memorandum, EPA's Administrator construed the household waste exemption in Section 3001(i) to include ash from the incineration of municipal solid waste. The Administrator's interpretation thus was in conflict with the construction adopted by the Court of Appeals. See *Environmental Defense Fund v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993) ("*EDF v. Chicago II*").

Upon reconsideration, the Court of Appeals, again in a two-to-one decision, held that the Administrator's memorandum did not affect its opinion or judgment in the case. *Id.* at 304. As in its prior opinion, the Court of Appeals concluded that, because EPA "has changed its view so often," its interpretation was not entitled to any deference. *Id.*

This Court again granted certiorari. *Environmental Defense Fund v. City of Chicago*, 125 L. Ed. 2d 687 (1993).

### SUMMARY OF ARGUMENT

It is undisputed that the judiciary is charged with the interpretation of statutes. The performance of this task, however, is not unfettered. Courts are bounded by rules of construction that are designed to elicit the statutory interpretation that best embodies the intention of its

drafters. Those longstanding and well-defined rules of construction were not followed faithfully in this instance. On the contrary, seizing upon recent admonitions from this Court not to rely excessively on legislative history, and refusing relentlessly to give even the slightest deference to the administrative agency's views, the lower court inappropriately jettisoned customary rules of statutory interpretation.

1. The starting point in statutory construction is the plain language of the statute itself. If the plain language of a statute, standing alone, fails to resolve the question of statutory interpretation, the reviewing court must turn to secondary sources to determine intent. The most prominent secondary source is legislative history.

Here, the Court of Appeals only briefly and selectively reviewed the legislative history of Section 3001(i) and then, based on letters from legislators dated three years after the statute's enactment, concluded that the legislative history failed to provide any guidance. The Court of Appeals did not examine the development of the relevant section, ignored several statements in relevant Committee Reports, except to conclude that the use of the word "generation" in one report was irrelevant, and failed to explore whether the placement of Section 3001(i) within the overall scheme of the Act bore any significance to its interpretation. In the end, the Court of Appeals erroneously failed to give any weight in its statutory analysis to legislative history.

2. When the language of the statute and its legislative history do not conclusively resolve a question of statutory interpretation, considerable deference is to be given to a reasonable interpretation by the administrative agency responsible for administering the statute. Even if an agency has reversed or modified its position, its views are nonetheless entitled to some deference. When a revision of an agency interpretation is justified by reasoned analysis, the level of deference required from a court is not reduced.

The Court of Appeals erroneously concluded that prior EPA statements amounted to "see-sawing" and therefore "deserved no weight at all." On remand, the Court of Appeals wrongly rejected an EPA memorandum containing an express and detailed agency analysis of Section 3001(i) as but "one more change of position." Thus, the Court of Appeals erroneously failed to give any deference whatsoever to EPA's reasonable and permissible interpretation of Section 3001(i).

3. After rejecting a reasonable construction of Section 3001(i) to the effect that ash generated by burning municipal solid waste at resource recovery facilities is exempt from hazardous waste regulation, and dismissing both the legislative history and reasoned agency interpretation which confirm that reading, the Court of Appeals found itself free to substitute its own judgment of the proper interpretation of Section 3001(i). It concluded that its interpretation was the only reasonable construction of Section 3001(i) consistent with the overall policy of RCRA.

In identifying that policy, however, the Court of Appeals neglected to consider equally valid and unambiguous statements of Congressional policy that conflicted with its interpretation of the statute. Even assuming the Court of Appeals accurately assessed the weight to be given the legislative history and EPA's interpretation of Section 3001(i), in substituting its judgment for that of the Congress and the Agency, it was not free to dismiss out of hand relevant, unambiguous and equally valid considerations that happened to conflict with its view. Not only is the reading it chose inconsistent with the provision itself, it runs counter to important considerations of policy that underlie the statute as a whole.

In each of the three foregoing respects, the judgment of the Court of Appeals is in error.

## ARGUMENT

### I. THE COURT OF APPEALS FAILED TO IDENTIFY PROPERLY AND GIVE APPROPRIATE WEIGHT TO RELEVANT LEGISLATIVE HISTORY

#### A. The Court of Appeals Inappropriately Accorded Equal Weight to Post-Enactment Statements and Contemporaneous Legislative History in Its Analysis of the Statute

The function of the courts in interpreting a statute is easily stated: to give effect to the intent of Congress. *United States v. American Trucking Ass'n*, 310 U.S. 534, 542 (1940). The most persuasive evidence of that intent is the plain language of the statute itself. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Where the plain language of a statute does not resolve a question of its interpretation, however, this Court has routinely turned to legislative history as the principal source for determining what Congress meant. *Train v. Colorado Pub. Interest Res. Group*, 426 U.S. 1, 9-23 (1976). *See also Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("[w]here, as here, resolution of a question of federal law turns on a statute and intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear").<sup>2</sup>

In the present case, instead of closely analyzing the legislative history and the structure of the statute, the Court of Appeals concluded, on the basis of letters from members of Congress dated three years after passage of the amendments, that *none* of the legislative history of Section 3001(i) was sufficiently explicit to shed light on

<sup>2</sup> Even where the plain language appears to resolve the question of its interpretation, the Court typically refers to the legislative history to confirm the presumption that Congress expresses its intent through the language it chooses. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).



the meaning of the provision. See *EDF v. Chicago I*, 948 F.2d at 348-49. Thus, no weight at all was accorded to the legislative history in the Court of Appeal's analysis. *Id.* at 351.

*Post facto* statements of intent by lawmakers, like the letters reviewed by the Court of Appeals, are not legislative history and it has long been recognized that such statements are not reliable sources of legislative intent. See, e.g., *United States v. Clark*, 445 U.S. 23, 33 n.9 (1979); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *United States v. Wise*, 370 U.S. 405, 411 & 414 (1962) (how members of a subsequent Congress may interpret a prior-enacted act has no weight for the purpose of construing that act). Indeed, the Court of Appeals here admitted that such statements "bear no necessary relationship to the forces at work at the time of enactment." *EDF v. Chicago I*, 948 F.2d at 351. Nevertheless, the Court of Appeals dismissed all the contemporaneous legislative history as "foggy" based on these letters.

This failure to meaningfully consider relevant legislative history clearly is a misapplication of the principles of statutory interpretation developed by this Court. See *Train v. Colorado Pub. Interest Res. Group*, 421 U.S. at 9-10 ("[t]o the extent that the Court of Appeals excluded reference to the legislative history of the [act] in discerning its meaning, the Court was in error"). Moreover, unburdened by extraneous post-enactment statements, the legislative history shows that the lower court erred when it failed to find that Congress intended Section 3001(i) to exempt ash from Subtitle C regulation.<sup>3</sup>

<sup>3</sup> In deciding not to accord any weight to Section 3001(i)'s legislative history, the Court of Appeals argues that recent opinions of this Court evidence a conviction that "recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor." *EDF v. Chicago I*, 948 F.2d at 350. To support this position the Court of Appeals cites a snippet of Justice Scalia's  
(continued...)

## B. The Legislative History Demonstrates that Congress Intended to Exempt Ash Generated by the Burning of Municipal Solid Waste at Resource Recovery Facilities from Hazardous Waste Regulation

### 1. The Senate and Conference Reports Evidence an Intent to Create an Exemption

The House of Representatives did not include in its version of the Hazardous and Solid Waste Amendments of 1984 any provision regarding the household waste exclusion. H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5649, 5677. The bill as passed by the Senate, however, included the language now found in Section 3001(i). See *id.* Thus, the Senate Committee reports addressing the provision in the Senate bill, and the Conference Committee's report explaining the decision to accept the Senate's version, are relevant sources for determining what Congress intended Section 3001(i) to mean. See *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) ("[t]he authoritative source for legislative intent lies in the Committee reports on the bill"). The Conference Committee report is normally entitled to considerable weight. See *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832 n.28 (1983).

The Conferees adopted the version of Section 3001(i) contained in the Senate bill without change. The

<sup>3</sup> (...continued)  
concurrence in *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989), but fails to put this quotation in context. In *Blanchard*, Justice Scalia's primary concern was that courts will achieve mindless "obedien[ce]" to cases cited in . . . committee reports" rather than interpret a statute consistent with its purpose. *Blanchard v. Bergeron*, 489 U.S. at 948. Nowhere in *Blanchard* does Justice Scalia suggest that it is appropriate to disregard completely a committee report and a conference report when faced with an ambiguous statutory provision.



Conference Report uses extremely broad language in describing the scope of Section 3001(i)'s household waste exclusion:

The Senate amendment clarifies that *an energy recovery facility is exempt from hazardous waste requirements* if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5677 (emphasis added). This language unambiguously implies that Congress intended to exempt energy recovery facilities from *all* RCRA hazardous waste requirements, provided certain specific conditions are met. No statements to the contrary appear in the Conference Report or in colloquy on the floor of either house of Congress during consideration of the Conference Report.

Similarly, the Report of the Senate Committee on Environment and Public Works contains expansive language regarding the household waste exclusion. The Committee "clarified" the scope of the household waste exclusion:

New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion *activities* of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

*All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .*

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). This explanation, by referring broadly, and without specificity, to "all waste management activities" of a resource recovery facility contains no indication that the exclusion was limited only to activities occurring before incineration.

## 2. *The History and Development of the Provision Evidences an Intent to Create an Exemption*

The intent evident in the Committee Reports is further demonstrated by the fact that enactment of Section 3001(i) in 1984 occurred after the promulgation in 1980 of EPA's regulations regarding the household waste exclusion. The preamble to the 1980 regulations clearly states EPA's express policy that ash was exempt from regulation as hazardous waste. See 45 Fed. Reg. 33084, 33098-99 (May 19, 1980) ("[s]ince household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste"). Thus, as of 1984, Congress had to have been well aware of EPA's interpretation that an exemption for ash existed. See *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990) (Congress is presumed to be aware of existing law when it passes legislation), citing *Cannon v. University of Chicago*, 99 S. Ct. 1946, 1957 (1979). Yet, neither the Senate Committee Report nor the Conference Report contain language indicating that Congress intended to depart from the policy in effect at that time.

Had Congress intended to reverse the clearly stated rule in the EPA 1980 preamble, it surely would have noted the change when adding the household waste exclusion to the text of RCRA in 1984. Accord *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) ("this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change . . . that is not the subject of at least some discussion in the legislative history")

(citations omitted). Likewise, had the Senate meant to limit the exclusion in any way, it would have used a more specific phrase than "all waste management activities" to describe the scope of coverage. See S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).<sup>4</sup>

### 3. *Clear Expressions of Statutory Policy Regarding Resource Recovery Evidences an Intent to Create an Exemption*

The Senate Report to the household waste exclusion contains the broad policy statement that: "It is important to encourage commercially viable resource recovery facilities and to *remove impediments that may hinder their development and operation.*" S. Rep. No. 284, 98th Cong., 1st Sess., at 61 (emphasis added). In 1984, when it expressed this policy, Congress had to have been cognizant of the disparate economic and other burdens of compliance that flow directly from the classification of a waste as "hazardous waste" requiring management under Subtitle C of RCRA, as opposed merely to "solid waste" entitled to management under Subtitle D.

From subtitle to subtitle, RCRA in its entirety is organized in descending measures of strictness, administrative burden, detail and cost. It thus is inconceivable that Congress would have made a policy statement strongly promoting the development and economically viable operation of resource recovery facilities while, at the same time, expecting its intent to be

<sup>4</sup> Under EPA's 1980 policy, household waste streams were exempt from regulation as hazardous waste. See 50 Fed. Reg. 33099. Household waste streams included waste generated by consumers at the household level and waste generated at hotels and motels. See *id.* When Congress amended RCRA in 1984, it expanded the household waste exclusion to include nonhazardous commercial and industrial waste. See 42 U.S.C. § 6921(i). Apparently, in codifying the exclusion in 1984, Congress did not intend to restrict the scope of EPA's policy but rather sought to expand its protections to other waste streams.

clear, without mentioning it directly, that ash generated by resource recovery facilities would be subject to full hazardous waste regulation.

As argued in more detail in the briefs of Petitioner and the other *amici*, the financial burdens that would be imposed upon resource recovery facilities if ash generated by burning municipal solid waste were subject to hazardous waste regulation would be enormous. It is hardly consistent with a policy of promoting the economically viable operation of resource recovery facilities to increase their ash disposal costs from \$42 to \$453 per ton, subject them to significantly more onerous and expensive regulations relating to its storage and transportation, and impose upon their owners and operators the extra burden of extensive and costly administrative compliance obligations.<sup>5</sup> It is unlikely that a Congress able to express its direct and explicit support for resource recovery facilities would have allowed its policy to be eroded by implication.

### 4. *Placement of the Provision within the Overall Scheme of the Act Evidences an Intent to Create an Exemption*

The placement of the household waste exclusion within the overall scheme of the RCRA also lends considerable support to the conclusion that Congress intended to create a broad exemption covering ash. The provision at issue appears at subsection (i) of Section 3001. 42 U.S.C. at § 6921(i). Section 3001 is devoted to threshold jurisdictional issues -- the identification and listing of hazardous wastes. *Id.* If a waste is identified as hazardous, a variety of regulatory consequences follow under Subtitle C. If it is not, it is exempt from such treatment. Section 3004 of RCRA, by contrast, specifically concerns rules and regulations applicable to owners and operators of facilities that store, treat and

<sup>5</sup> See Reilly Memorandum at 6-7.



dispose of hazardous waste. 42 U.S.C. at § 6924. Had Congress, as the Court of Appeals concluded, intended narrowly to exempt resource recovery facilities only from the regulations governing treatment, storage and disposal facilities, surely it would have placed the provisions now in subsection (i) in Section 3004, where those rules are delineated, and not in Section 3001, which deals with the issue of whether any aspect of Subtitle C of RCRA is triggered at all.

**5. The Use of the Word "Generation" in the Senate Report Evidences an Intent to Create an Exemption**

The word "generation" was used in the Senate Committee's explanation of Section 3001(i). *See, supra*, p. 10. The use of this word demonstrates that, as understood by the Committee, the household waste exclusion creates an exemption for ash generated by the incineration of municipal solid waste. The Court of Appeals declined to grant any significance to the use of this word, stating that it was "tossed around," did not appear in the final bill, and was only a single word. *EDF v. Chicago I*, 948 F.2d at 351.

The very significance of its use in the Senate Report, however, is underscored by the fact that the word "generation" did not appear in the bill considered and marked up by the Senate Committee. Nevertheless, as the Committee Report shows, the Senate Committee clearly believed the act of "generating" ash was covered by the words already in the bill. At no point did the Senate, or its Committee, believe it necessary to insert the word "generation" expressly into the bill in order to forestall the possibility that the provision would be perceived to contain an ambiguity.

The Court of Appeals implicitly assumed that the absence of the word from the statute resulted either from a lack of seriousness, *id.* at 351 ("tossed around"), or from the rough and tumble of Conference Committee

haggling, *id.* at 351. But, "[t]his Court generally is reluctant to draw [such] inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). Indeed, it is equally if not more plausible that the Senate believed the terms of the provision which delineated the activities to be covered by the exemption were sufficiently broad to encompass its intention that acts of "generation" be included in their coverage. *Accord id.* at 306 (failure to adopt an explicit amendment is not reliable evidence that Congress did not address the matter, since it is equally plausible that the amendment was not adopted because Congress believed the legislation already covered the matter).

The issue is whether any of the terms set forth in Section 3001(i) are sufficiently broad to cover "generation." The Senate Report makes it clear that the Senate thought it did. The Senate Report is the only contemporaneous source of legislative history that directly interprets the language in Section 3001(i). No other source of legislative history even discusses the language at issue, let alone adopts a view contrary to that of the Senate's. The Senate interpretation never varied during Committee consideration of the Senate bill. No Senator took a contrary position during debate in the Senate. The Senate bill was acceded to by the House without dissent of any kind on the scope of the exemption language inserted into the Conference Report or spoken during debate. Most importantly, as shown above, the interpretation in the Senate Committee Report is both consistent with and supported by other relevant facets of the legislative history.<sup>6</sup> To characterize the Senate view as no more than the mere "tossing around" of a single word is misleading; surely, in the absence of some contradictory expression, the Senate's view is entitled to substantial weight.

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<sup>6</sup> For further detailed discussion of the legislative history of RCRA, the 1984 Hazardous and Solid Waste Amendments and Section 3001(i), see Brief of the Petitioners, Section I.C; and Brief of Wheelabrator Technologies, Inc., et al. as *Amici Curiae* in Support of Petitioners, Section I.C.



## II. THE COURT OF APPEALS ERRED IN FAILING TO GRANT ANY DEFERENCE WHATSOEVER TO EPA'S STATEMENTS INTERPRETING SECTION 3001(i)

When a statute and its legislative history fail to address a question explicitly, well-settled rules of statutory construction require a reviewing court to defer to a reasonable interpretation of the administrative agency responsible for administering the statute, even if it is not the interpretation the Court would necessarily favor. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *National RR Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401 (1992); *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993). In *EDF v. Chicago I*, however, after pronouncing the statute ambiguous and the legislative history foggy, the Court of Appeals concluded that the EPA had changed its views so often it was not entitled to deference. *See EDF v. Chicago I*, 948 F.2d at 350. On remand, the Court of Appeals again rejected an agency analysis as nothing more than another change of position. *See EDF v. Chicago II*, 985 F.2d at 304 (discussing the Reilly Memorandum).

In each instance, the Court of Appeals misconstrued the import and substance of the relevant EPA interpretations and failed to grant proper deference to the applicable EPA interpretation as the rules of this Court require. The purported agency "waffling" hardly amounted to the kind of "sharp break with the past" that could warrant the discounting of an agency's view. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991). Moreover, even if it can be said that the EPA changed its position, its current view, based as it is on reasoned analysis, is nonetheless entitled to deference.

### A. The Court of Appeals Misconstrued the Substance and Import of the Agency Interpretations It Rejected as Agency Waffling

Prior to enactment of Section 3001(i), EPA clearly viewed the household waste exclusion as exempting combustion ash. *See supra*, p. 11. This view is expressly stated in the preamble to the regulations that first adopted the household waste exclusion. *See id.*

The Court of Appeals concluded, however, that EPA revised that position following the enactment of Section 3001(i). *EDF v. Chicago I*, 948 F.2d at 348. The Court based this finding on agency statements in the preamble to 1985 regulations promulgated to implement Section 3001(i) and other 1984 amendments. The preamble to the 1985 regulations states EPA's view that:

[t]he statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate Report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith effort to avoid such a

result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste. However, EPA has no evidence to indicate that these ash residues are hazardous under existing rules.

50 Fed. Reg. 28702, 28725-26 (July 15, 1985). EPA went on to state that:

EPA does not believe the HSWA impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. *Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.*

*Id.* (emphasis added).

Although the foregoing statement nowhere adopts a definitive interpretation of Section 3001(i), which the Court of Appeals acknowledged, it was nevertheless characterized by the Court as a reversal of the Agency's prior definitive statement excluding ash. *EDF v. Chicago I*, 948 F.2d at 348. As the language quoted above shows, however, EPA's 1985 statements are ambiguous. At most, they acknowledge that the issue of whether ash should remain exempt under Section 3001(i) must await

future consideration of conflicting policy and technical issues.

The Court of Appeals also cites two instances involving testimony by EPA officials at Congressional committee hearings to conclude that the Agency had waffled. *EDF v. Chicago I*, at 349-50. These snippets of testimony suggest that EPA's thinking on the scope of the household waste exclusion may have been modified somewhat over the years. They do not, however, constitute definitive positions, supported by thorough and reasoned analysis of the issues. At most, they constitute bureaucrats thinking fast on their feet about an issue that still awaited resolution by the Agency.

EPA's administrative record is likewise devoid of any continuous issuance and retraction of rules, regulations or other binding requirements on the regulated community concerning the scope of Section 3001. Rather, the thorough Agency consideration of the issue foreshadowed by EPA in its 1985 statement is contained in the Reilly Memorandum that was issued in 1992. Yet, the Court of Appeals dismissed this formal, definitive and explicit policy analysis of the issue as nothing more than another change of the Agency's position.

In sum, none of the examples of Agency waffling cited by the Court of Appeals amount to the kind of flip-flopping upon which deference to agency views by a Court may legitimately be denied. *Compare Immigration & Naturalization Servs. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221, n.30 (1987) (alternative basis for rejecting Agency's position where the Agency in formal adjudicatory decisions interpreted statutory provision "in at least three different ways"). Rather, the facts in this case suggest that the Court of Appeals erred when it refused to accord any deference to the Agency's position solely because that position had been evolving in the years since the enactment of Section 3001(i).



**B. Even Assuming That the Agency's Views Have Changed over Time, the Court of Appeals Erroneously Failed to Give Proper Deference to the Reilly Memorandum**

Even if an agency's views have changed over time, where its construction of a statute is reasonable and not in direct conflict with the object and policies of the statute, its opinion should be accorded deference. See *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161 (where an agency's interpretation of a statute is "at least as plausible" as competing ones, courts should defer to the agency's view notwithstanding that it is a break with a previous position). This is especially the case where revisions to an agency interpretation are justified by the agency's thorough and reasoned analysis. See *Rust v. Sullivan*, 111 S. Ct. 1769 (1991). See also *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 863. When the agency's current view closely fits the design of a statute as a whole and is not inconsistent with its object and policy, it should be accorded deference. See *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161.<sup>7</sup>

Here, EPA's first comprehensive and definitive policy analysis to adopt an explicit position on the scope of Section 3001(i) states that ash is within the household waste exclusion. See Reilly Memorandum at 1. The Agency justifies this position in a thorough analysis of the law and policies underlying it. See *id.* at 2-7. To the extent there has been waffling in the past, it has not been nearly as equivocal as the Court of Appeals suggests, and does not warrant a blanket rejection of the Agency's current position. Indeed, as shown above, and in the Reilly Memorandum, the EPA's current view "closely fits

<sup>7</sup> In contrast, courts must reject an administrative construction of a statute that is inconsistent with the statutory mandate or frustrates the policy that Congress sought to implement. See *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

'the design of the statute as a whole and . . . its object and policy.'" *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161 (citation omitted). The Agency view was at least entitled to some deference, and the Court of Appeals erred when it failed to give it any deference at all.

**III. A CONTEXTUAL ANALYSIS OF SECTION 3001(i) EQUALLY SUPPORTS THE REASONABLENESS OF A CONSTRUCTION THAT ASH INDEED IS EXEMPT FROM HAZARDOUS WASTE REGULATION**

The Court of Appeals noted that Congress intended to promote proper disposal of dangerous substances that otherwise would seep into the ground and water table. *EDF v. Chicago I*, 948 F.2d at 351-52. It concluded, therefore, that the only construction of Section 3001(i) that could be consistent with this underlying policy is one requiring ash from the burning of municipal waste to be subject to full hazardous waste regulation under Subtitle C of RCRA. *Id.* ("[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills").<sup>8</sup> Assuming its conclusions, the Court of Appeals suggests that since any construction of the provision other than its own would be absurd, its construction must represent the "plain meaning" of Section 3001(i). *Id.*

In identifying the relevant policy, however, the Court of Appeals neglected to consider equally valid, clear and unambiguous statements of Congressional policy

<sup>8</sup> The Court of Appeals seemed not to appreciate that so-called "ordinary landfills" also must meet certain minimum regulatory requirements under Subtitle D of RCRA and regulations enacted by EPA. See, e.g., 40 C.F.R. pt. 258. These include installation of liners, leachate collection, groundwater monitoring and post-closure care. *Id.*



underlying RCRA and Section 3001(i) itself. Even assuming the Court of Appeals accurately assessed the weight to be given the legislative history and EPA's interpretation of Section 3001(i), in substituting its judgment for that of the Congress and the Agency, it was not free to dismiss out of hand plainly relevant but conflicting factors in reaching to justify its own interpretation.

**A. An Exemption for Ash from Resource Recovery Facilities is Consistent with Congressional Policy to Promote Commercially Viable Resource Recovery Facilities**

As a matter of environmental policy, resource recovery is one important means of mitigating the clear and present solid waste crisis in the United States.<sup>9</sup> To the extent municipal solid waste can safely be incinerated instead of disposed in landfills, the problems of lack of landfill space and the huge administrative and financial costs currently burdening States and municipalities will be at least partially alleviated.<sup>10</sup> To the extent incineration

<sup>9</sup> See Statement of Lee M. Thomas, Administrator of the U.S. Environmental Protection Agency, before the Subcommittee on Transportation Tourism and Hazardous Materials of the House Committee on Energy and Commerce, at 2 (April 13, 1988) ("municipal waste combustion, preferably with energy recovery, will be needed to reduce the massive [solid waste] volumes further in many urban areas"). It also has been estimated that the promotion of resource recovery and other waste-to-energy facilities can reduce the volume of refuse by up to 90 percent, and thereby extend the lives of many landfills. See generally "Resource Recovery in the United States," National Solid Wastes Management Association, at 3 (Sept. 1, 1979), citing U.S. Environmental Protection Agency, *Municipal Solid Waste Landfill Survey* (1986). See also Reilly Memorandum at 6.

<sup>10</sup> Combustion of municipal solid waste had increased to 32 million tons, or roughly 16 per cent of generation, in 1990. All major new combustion facilities have energy recovery and are designed to meet air pollution standards. About 35 million tons of municipal solid waste will be combusted in 1995, and 46 million tons will be combusted in (continued...)

takes place in combination with energy recovery, production of electricity also can only become less wasteful, more efficient, and less costly. See generally 42 U.S.C. at §§ 6901(d), 6902(a)(11), 6941(a)(2). Moreover, ancillary costs, such as the loss of revenue from potentially productive land reserved for landfill space, also may be minimized.

These potential benefits of resource recovery are consistent with the policy statement in the Senate Committee Report that commercially viable resource recovery facilities should be promoted under the Act and impediments to their operation removed. See S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). They also are consistent with the overall objective of RCRA which, in addition to creating a cradle-to-grave system for hazardous wastes, was enacted to "maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation." See 42 U.S.C. § 6941; see also 42 U.S.C. § 6941a(3) (recovery of energy from municipal waste can have the effect of reducing the volume of the municipal waste stream and the burden of disposing increasing volumes of solid waste). It is evident, therefore, that it would neither be absurd nor incompatible with underlying policy to construe Section 3001(i) as conferring an exemption for ash generated by resource recovery facilities.

The interpretation of the meaning of statutes, as applied to cases and controversies, is exclusively a judicial function. See *United States v. American Trucking Ass'n*, 310 U.S. at 542. This Court has cautioned, however, that:

<sup>10</sup> (...continued)

2000. See U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, at ES-9-10 (July 1992).

[t]his duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously, there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body.

*Id.* at 544. See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 866 ("federal judges - who have no constituency - have a duty to respect the legitimate policy choices made by those who do"). The Court of Appeals erred when it substituted its own interpretation of the meaning of Section 3001(i) of RCRA without even addressing, let alone explaining, its decision to ignore a manifestly reasonable, contradictory interpretation.

### CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to reverse the judgment of the Court of Appeals and find that Section 3001(i) excludes ash from regulation under Subtitle C of RCRA.

Respectfully submitted,

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